

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 February 2021

Public Authority: Hounslow and Richmond Community Health Care Trust

Address: Thames House
180 – 194 High Street
Teddington
Middlesex
TW11 8HU

Decision (including any steps ordered)

1. The complainant has requested from Hounslow and Richmond Community Healthcare Trust ("the Trust"), information regarding the names of doctors who left comments in medical notes.
2. The Commissioner's decision is that the Trust was entitled to withhold the requested information under section 40(2) of the FOIA.
3. The Commissioner does not require the Trust to take any steps as a result of this decision notice.

Request and response

4. On 14 September 2020, the complainant wrote to the Trust and requested information in the following terms:

"I have had a word with the GMC about the note below and they have advised me to request the name of the doctor(s) under the Freedom of Information Act. As this comment from two? doctors preceded the safeguarding enquiry, and appears to be simply gossip, there may be

an issue of breach of confidentiality. The fact that it was inaccurate is not an issue at the moment. This is just about the law.”

5. The Trust responded on 22 September 2020. It stated that it was not handling the request under the FOIA, as the FOIA does not give individuals access to their own personal data. It explained that the request would be handled under the General Data Protection Regulations (GDPR).
6. The Trust went on to explain that the notes left in the medical record, were made by a doctor who does not work for the Trust and as such, the details could not be provided.
7. Following an internal review the Trust wrote to the complainant on 25 September 2020. It stated that having completed an internal review, it was upholding its original position, as it did not have permission to share the doctor's name.

Scope of the case

8. The complainant contacted the Commissioner on 22 September 2020, to complain about the way their request for information had been handled.
9. The Commissioner considers the scope of her investigation to be to establish whether the public authority is entitled to withhold the requested information under section 40(2) of the FOIA.

Reasons for decision

Section 40 personal information

10. 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.
11. 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

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

processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').

12. 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.
13. 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?

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

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

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.
17. 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.
18. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subjects. The names of the data subjects quite obviously is information that both relates to and identifies those concerned. 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 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.
20. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

21. 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".

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) of the GDPR

24. 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"².

25. 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.

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".

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".

26. 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

27. 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.
28. 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 be proportionate. Legitimate interests may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
29. The Commissioner accepts that there is a legitimate interest in the accountability of public authorities as a general principle. There is also the legitimate interest of the requester, the complainant.
30. In this case it is clear that the complainant is seeking access to the withheld information for a specific reason: to see who made a comment about them, which they have explained they disagree with the opinions expressed in the comment and they consider the comment to be incorrect/untrue.
31. The Council has explained that it does not believe there is a legitimate interest in disclosing the information. It explained that it has already exempted the disclosure from a Subject Access Request that has been made, due to the information being personal data.
32. The Commissioner considers that there is limited legitimate interest in disclosure of this information.

Is disclosure necessary?

33. '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.
34. As disclosure under the FOIA is disclosure to the world at large, it is rare that such processing will be necessary to achieve a legitimate interest.

35. The Commissioner is satisfied that the specific information requested in this case has not otherwise been made available to the public and that therefore, in this case there are no less intrusive means of achieving the legitimate aims identified.

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

36. 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.

37. 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.

38. In the Commissioner's view, a key issue is whether the individuals concerned have 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.

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

40. The Commissioner is mindful that disclosure under the FOIA is disclosure to the world at large and not just to the requestor. It is the equivalent of the Trust publishing the information on its website.

41. The complainant has explained that the comments left on their mother's medical notes are not accurate and they are concerned that the doctor who made the remarks, does not know them. They want to know who the doctor is, as they consider that their confidentiality has been

breached and that they have been undermined in their efforts to support their mother.

42. The Trust has explained that the doctor who made the notes on the medical record, does not work for it and as such, they do not have authorisation to share this information.
43. It also explained that the notes were left in a medical capacity and formed part of a personal opinion and clinical concerns for the complainant.
44. The Trust explained that it suggested to the complainant that they could leave a note on the medical records, clarifying that the complainant objected to the comments made.
45. The Trust has also explained that it believes that disclosure of the information would cause unnecessary stress to the individual concerned and that there would be no public interest in disclosing the information.
46. The Commissioner acknowledges that the doctor's comments have caused the complainant some distress. However, upon review, she has no evidence that the doctor's actions, in this case, have led to instances of wider harm.
47. 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.
48. 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.
49. 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

50. 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

51. 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.
52. 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

Phillip Angell
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