

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 3 December 2009

Public Authority: The Royal Orthopaedic Hospital NHS Foundation Trust
Address: Bristol Road South
Northfield
Birmingham
B31 2AP

Summary

The complainant made a request under the Freedom of Information Act 2000 (the "Act") to the Royal Orthopaedic Hospital NHS Foundation Trust (the "Trust") for specific information relating to an incident involving a patient. The Trust confirmed or denied whether it held that information under section 1(1)(a) of the Act. After considering the case, the Commissioner's decision is that the Trust was excluded even from its duty to respond to the request under section 1(1)(a) by virtue of the provisions of section 40(5)(b)(i) because, in responding to the request, it had to disclose information which constitutes sensitive personal data of the patient. The Commissioner does believe, however, that the Trust failed to meet the requirements of section 17(1). The Commissioner does not require the Trust to take any further steps in relation to the complainant's request.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.
2. In considering this case, the Commissioner has also taken into account the requirements of the Data Protection Act 1998 (the "DPA").

The Request

3. In an email dated 17 April 2009 the complainant made the following request to the Trust,

“I would like to request the following information using the Freedom of Information Act:

There was a [...] patient operated on for a [...] condition at [...] Hospital in London in late January. The [patient] was returned to Royal Orthopaedic Hospital post operatively in an ambulance and suffered [...] My understanding is that the nursing director, Lindsey Webb, conducted an investigation into this.

Can I have a copy of any investigation carried out by Ms Webb or anyone else at the Royal Orthopaedic Hospital into this incident? May I have any reports carried out by other bodies relating to this incident which are in the possession of the hospital? Can I also ask for any communications that have taken place either within [the Trust] or with external parties on this incident, for example with the PCT or SHA.”

(The request has been redacted in order to remove information which might lead to the potential identification of the patient concerned.)

4. The Trust acknowledged this request in an email dated 7 May 2009. This informed the complainant that the response was being drafted and a reply would be forthcoming as soon as possible.
5. Having received no response, the complainant emailed the Trust on 26 May 2009 and asked whether it was in a position yet to respond to his request. In an email dated 1 June 2009 the Trust confirmed that it would issue a response the next day.
6. On 2 June 2009 the Trust replied to the complainant's request. In this response the Trust confirmed or denied whether information which fell under the scope of the request was held under section 1(1)(a) of the Act. Due to the Commissioner's decision in this case this Notice does not detail the Trust's exact response.
7. On 8 June 2009 the complainant requested an internal review from the Trust. On 18 June 2009 the Trust conducted an internal review in relation to this request, and reasserted its previous position.

The Investigation

8. On 14 July 2009 the complainant contacted the Commissioner to make a complaint in relation to the Trust's response to his request. In his complaint he acknowledged that he knew the identity of the patient concerned, and also that the patient's representative had stated that they did not want any publicity.

Chronology

9. The Commissioner contacted the Trust on 20 August 2009 in order to discuss its handling of the complainant's request.
10. In a letter dated 21 September 2009 the Trust responded to the Commissioner. In this letter it also informed the Commissioner that the complainant was aware of the patient's identity. It also informed him that the patient's representative had explicitly refused consent for information to be disclosed to the complainant. In making a decision on this case the Commissioner has considered the Trust's response.
11. In an email dated 2 October 2009 the Commissioner wrote to the complainant and informed him of the likely outcome of the case. He asked the complainant whether, after considering his email, he wished the case to continue to a decision notice. If so, he invited the complainant to make further submissions, if he wished to do so.
12. On 6 October 2009 the complainant contacted the Commissioner and confirmed that he wished to proceed to a decision notice.

Analysis

Exemption

Section 40

13. Section 40(1) to (5) provide exemptions for information which falls under the definition of personal data, as set out in the Data Protection Act 1998 (the "DPA"). In this case the Commissioner has considered the application of section 40(5).
14. In relation to a request for information which constitutes the personal data of individual(s) other than the applicant section 40(5) states that –
 - "The duty to confirm or deny –
 - (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection(1), and
 - (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act

1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

- (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed). “

15. The 'duty to confirm or deny' is set out in section 1(1)(a) of the Act. This states that,

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request...”

16. Therefore if to comply with the duty to confirm or deny whether it holds requested information a public authority would disclose personal data of a third party, and if that disclosure would, in itself, be in breach of the principles of the DPA, section 40(5)(b)(i) would apply.

17. The full text of section 1 and section 40 can be found in the Legal Annex at the end of this Notice.

18. Given the nature of the complainant's request (as detailed at paragraph 3 above) the Commissioner believes that even by confirming or denying whether it held relevant information the Trust would inevitably reveal (or confirm) details of the physical or mental health or condition of the patient.

19. As this case centres on a request for information which was potentially the personal data of a third party the Commissioner considers that the proper approach is to first consider whether or not the Trust was excluded from the duty to confirm or deny, by virtue of section 40(5)(b)(i).

20. In order to consider the application of section 40(5)(b)(i), the Commissioner has to first consider whether the requested information, if held, would be the personal data of a third party (i.e. the patient). If so, given the nature of the request, he believes that he then has to go on to consider whether that information would fall under the definition of sensitive personal data, as set out in section 2 of the DPA. Finally he has to consider whether or not confirming or denying whether it held any information that fell under the scope of the request would contravene any of the data protection principles – in particular the first principle of the DPA.

21. In reaching a view on this the Commissioner has had to bear in mind that the Act is applicant blind, except in a few limited scenarios, none of which are applicable in this case. In other words, the potential disclosure of information under the Act has to be considered as a potential disclosure to the world at large. Consideration cannot be given to the identity of the applicant.

22. The Commissioner has first considered whether the information, if it were held, would be the personal data of a third party (specifically the patient).
23. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:
 - from that data, or
 - from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
24. In this instance the information requested is details of an investigation carried out in regard to an incident involving a particular patient, together with any communications that have taken place in regard to this incident, either internally or externally. This incident related to the health and medical care of the patient.
25. From the evidence provided by both parties the Commissioner is satisfied that the patient is alive. Therefore the requested information would, if it were held, relate to a living individual. Given the nature of the request (and the fact that the complainant has already admitted that he knows the identity of the patient) the Commissioner is also satisfied that that individual would be identifiable from this information.
26. Having considered the nature of this request, and the circumstances of the case, the Commissioner has concluded that if the requested information were held all of it would be the personal data of the patient.
27. The Commissioner has gone on to consider whether the information, if it were held, would fall within the definition of sensitive personal data as set out in section 2 of the DPA. This defines sensitive personal data as personal data relating to, amongst other things, an individual's physical or mental health or condition. The full text of section 2 of the DPA can be found in the Legal Annex at the end of this Notice.
28. In this instance the request focuses on information regarding an incident involving a particular patient, and any subsequent investigation into that incident. As noted above, this incident related to the health and medical care of the patient. Therefore the Commissioner is satisfied that given the nature of the request, any information that fell within it (if it were held) would be intrinsically linked to the patient's physical or mental health or condition, and would therefore fall within the definition of sensitive personal data as set out above.
29. Furthermore the Commissioner believes that the nature of the request meant that the Trust's response in accordance with its duty under section 1(1)(a) inevitably disclosed or confirmed information relating to the physical or mental health or condition of the patient concerned.

Would complying with the duty to confirm or deny contravene the first data protection principle?

30. The first principle of the DPA requires that personal data is processed fairly and lawfully and that,

- at least one of the conditions in Schedule 2 is met, and
- in the case of sensitive personal data, at least one of the conditions in Schedule 3 is met.

As the requested information in this case, if held, would fall under the definition of sensitive personal data, the Commissioner has initially considered whether one of the conditions in Schedule 3 can be met. He has considered Schedule 3 first as he believes the conditions listed here are more limited than those listed in Schedule 2.

31. Given the number of conditions listed in Schedule 3 of the DPA, together with the additional conditions listed in The Data Protection (Processing of Sensitive Personal Data) Order 2000¹, the Commissioner has not reproduced them in the body of this Notice. However, the full text of Schedule 3 of the DPA can be found in the Legal Annex at the end of this Notice.

32. Having considered the conditions listed in Schedule 3 the Commissioner has formed the view that none can be met. Accordingly the Commissioner believes that to confirm or deny whether it held any information which fell under the scope of the request would, in itself, be in breach of the first principle of the DPA.

33. As such the Commissioner has not gone on to consider whether there is a Schedule 2 condition or whether the confirmation or denial would be fair or lawful.

34. Although he has not gone on to consider whether the disclosure of this information would be fair, the Commissioner notes that in this case the patient's personal representative explicitly refused consent for any information to be disclosed as a result of the complainant's request. The Commissioner would point out that were he to consider the question of fairness he would give appropriate weight to this explicit refusal of consent.

35. The Commissioner therefore finds that the Trust was not obliged to have responded to the complainant's request in accordance with the duty imposed on it by the provisions of section 1(1)(a) by virtue of the provisions of section 40(5)(b)(i). The Commissioner will not proactively seek to consider such exemptions in all cases before him, but in some cases where personal data is involved the Commissioner believes he has a duty to consider the rights of data subjects. These rights, set out in the DPA, are closely linked to article 8 of the Human Rights Act 1998. The Commissioner believes that he would be in breach of his obligations under the Human Rights Act 1998 if he ordered disclosure of information or confirmation/denial without having considered these rights, even if the public authority has not cited the exemption.

¹ This is available online at <http://www.statutelaw.gov.uk/Home.aspx>.

Procedural Requirements

36. Section 17(1) requires a public authority, which is relying upon an exemption in order to refuse to confirm or deny whether it holds requested information, or to withhold requested information, to issue a refusal notice which
- (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.

Section 17(1) also requires that this notice should be issued within the time for complying with section 1(1), i.e. within twenty working days.

37. In this instance the request was made on 17 April 2009. However, the Trust did not issue a refusal notice until 2 June 2009.
38. Therefore the Commissioner believes that the Trust did not meet with the requirements of section 17(1) of the Act.
39. The full texts of section 17 can be found in the Legal Annex at the end of this Notice.

The Decision

40. The Commissioner's decision is that the Trust did not have a duty to comply with section 1(1)(a) of the Act on the basis of the exemption contained at section 40(5)(b)(i).

However, the Commissioner is also of the view that the Trust failed to meet the requirements of section 17(1).

Steps Required

41. The Commissioner requires no steps to be taken.

Other Matters

42. The Commissioner acknowledges that this has been a complex case and can understand the Trust's failure to correctly apply section 40(5)(b)(i) on this occasion. However he would encourage the Trust and other public authorities to always consider the application of section 40(5)(b)(i) when considering its response to a request under the Act of this nature in the future.

Right of Appeal

43. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 3rd day of December 2009

Signed

**David Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1

- (1) Any person making a request for information to a public authority is entitled –
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.
- (2) Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.
- (3) Where a public authority –
- (a) reasonably requires further information in order to identify and locate the information requested, and
 - (b) has informed the applicant of that requirement,
- the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.
- (4) The information –
- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
 - (b) which is to be communicated under subsection (1)(b),
- is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.
- (5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).
- (6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

Section 17

- (1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt

information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

(2) Where—

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

(6) Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,

- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
 - (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.
- (7) A notice under section (1), (3) or (5) must –
- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
 - (b) contain particulars of the right conferred by section 50.

Section 40

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if-
- (a) constitutes personal data which do not fall within subsection (1), and
 - (b) either the first or the second condition below is satisfied.
- (3) The first condition is-
- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
 - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
- (4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

- (5) The duty to confirm or deny-
- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
 - (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).
- (6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.
- (7) "the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
- "data subject" has the same meaning as in section 1(1) of that Act;
- "personal data" has the same meaning as in section 1(1) of that Act.

The Data Protection Act 1998

Section 2

In this Act "sensitive personal data" means personal data consisting of information as to –

- (a) the racial or ethnic origin of the data subject,
- (b) his political opinions,
- (c) his religious beliefs or other beliefs of a similar nature,
- (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
- (e) his physical or mental health or condition,
- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence, or
- (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings

First Principle

- (1) Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
- (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

Schedule 3

Conditions relevant for purposes of the first principle: Processing of sensitive personal data

- (1) The data subject has given his explicit consent to the processing of the personal data.
- (2) — (1) The processing is necessary for the purposes of exercising or performing any right or obligation which is conferred or imposed by law on the data controller in connection with employment.
- (2) The Secretary of State may by order—
- (a) exclude the application of sub-paragraph (1) in such cases as may be specified, or
 - (b) provide that, in such cases as may be specified, the condition in sub-paragraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied.
- (3) The processing is necessary—
- (a) in order to protect the vital interests of the data subject or another person, in a case where—
 - (i) consent cannot be given by or on behalf of the data subject, or
 - (ii) the data controller cannot reasonably be expected to obtain the consent of the data subject, or
 - (b) in order to protect the vital interests of another person, in a case where consent by or on behalf of the data subject has been unreasonably withheld.
- (4) The processing—
- (a) is carried out in the course of its legitimate activities by any body or association which—
 - (i) is not established or conducted for profit, and

- (ii) exists for political, philosophical, religious or trade-union purposes,
 - (b) is carried out with appropriate safeguards for the rights and freedoms of data subjects,
 - (c) relates only to individuals who either are members of the body or association or have regular contact with it in connection with its purposes, and
 - (d) does not involve disclosure of the personal data to a third party without the consent of the data subject.
- (5)** The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.
- (6)** The processing—
 - (a) is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings),
 - (b) is necessary for the purpose of obtaining legal advice, or
 - (c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights.
- (7)** (1) The processing is necessary—
 - (a) for the administration of justice,
 - (b) for the exercise of any functions conferred on any person by or under an enactment, or
 - (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department.

(2) The Secretary of State may by order—

 - (a) exclude the application of sub-paragraph (1) in such cases as may be specified, or
 - (b) provide that, in such cases as may be specified, the condition in sub-paragraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied.
- (8)** (1) The processing is necessary for medical purposes and is undertaken by—
 - (a) a health professional, or
 - (b) a person who in the circumstances owes a duty of confidentiality which is equivalent to that which would arise if that person were a health professional.

(2) In this paragraph “medical purposes” includes the purposes of preventative medicine, medical diagnosis, medical research, the provision of care and treatment and the management of healthcare services.
- (9)** (1) The processing—

- (a) is of sensitive personal data consisting of information as to racial or ethnic origin,
 - (b) is necessary for the purpose of identifying or keeping under review the existence or absence of equality of opportunity or treatment between persons of different racial or ethnic origins, with a view to enabling such equality to be promoted or maintained, and
 - (c) is carried out with appropriate safeguards for the rights and freedoms of data subjects.
- (2) The Secretary of State may by order specify circumstances in which processing falling within sub-paragraph (1)(a) and (b) is, or is not, to be taken for the purposes of sub-paragraph (1)(c) to be carried out with appropriate safeguards for the rights and freedoms of data subjects.
- (10)** The personal data are processed in circumstances specified in an order made by the Secretary of State for the purposes of this paragraph.