

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 September 2012

Public Authority: Betsi Cadwaladr University Health Board

Address: Ysbyty Gwynedd
Penrhosgarnedd
Bangor
Gwynedd
LL57 2PW

Decision (including any steps ordered)

1. The complainant requested information about employees who had been suspended during a specified period. Betsi Cadwaladr University Health Board ('the Health Board') withheld the information under section 40(2) of the FOIA. The Commissioner's decision is that the Health Board correctly relied on section 40(2) of the FOIA for the non disclosure of the requested information. The Commissioner requires no further action to be taken.

Request and response

2. On 20 April 2012, the complainant wrote to the Health Board and requested information in the following terms:

"Further to the ICO's Decision Notice Reference FS50423868 I would like to amend my original request (see your ref: 282/11/FOI) to the following:

For the 50 employees the BCUHB confirmed had been suspended please supply the following information:

1. Their Job Grade
2. The length of their suspension
3. The outcome of their suspension (i.e., whether they returned to work, left or their suspension is still ongoing".

3. The Health Board responded on 8 May 2012 stating that it estimated that, to comply with the request would exceed the appropriate cost limit under section 12 of the FOIA. The Health Board stated that, even if it were able to comply with the request within the appropriate limit, it considered the requested information to constitute personal data and disclosure would breach the first data protection principles. As such, it considered that section 40(2) of the FOIA also applied to the requested information.
4. On 31 May 2012, the complainant requested an internal review of the Health Board's decision in relation to his request. In his internal review request, the complainant agreed to refine his request to the period from 1 March 2009 to 31 May 2011. He understood this would bring compliance with the request within the appropriate cost limit. He also disputed the Health Board's application of section 40 as he did not agree that individuals could be identified from the information requested.
5. The Health Board provided the outcome of its internal review on 12 June 2012. It confirmed that, as the request had been refined it was no longer relying on section 12 of the FOIA, it maintained that the information requested was exempt under section 40(2) of the FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 21 June 2012 to complain about the way his request for information had been handled. The complainant asked the Commissioner to consider whether the information he requested should be disclosed. He indicated that he did not believe that individuals could be identified through disclosure of the information he had requested.

Reasons for decision

Background

7. As referred to in paragraph 2 of this notice, the request in this case follows on from an earlier request for similar information which was considered by the Commissioner in a decision notice he issued on 4 April 2012 under case reference number FS50423868¹. In that case, the

¹ http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fs_50423868.ashx

request differed slightly in that it asked for the job title or job grade, the dates they were suspended from and to, the reasons for the suspension and the outcome of the suspension. In that case, the Commissioner determined that the information requested was personal data as individuals could be identified if the information were disclosed, and that disclosure would breach the first data protection principle. The Commissioner was therefore satisfied that the Health Board had correctly applied section 40(2) of the FOIA. The request which is the subject of this notice is a refinement of this earlier request.

Section 40 – personal information

8. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the FOIA would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').
9. In this case, the Health Board argued, despite the refinement of the earlier request, individuals would still be identifiable if the information were disclosed, and as such the information constitutes the personal data of the individuals who had been suspended. It maintains that disclosure under the FOIA would breach the first data protection principle.
10. In order to rely on the exemption provided by section 40, the information being requested must constitute personal data as defined by section 1 of the DPA. It defines personal information as data 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.

Is the requested information personal data?

11. The withheld information in this case consists of information about employees who had been suspended between 1 March 2009 and 31 May 2011, including the job grade, the duration of the suspension, and the outcome of the suspension. For some of the individuals who were suspended during the period in question, the investigation into the suspension was on-going at the time of the request. As such the duration of their suspension represents the position at the time of the request.
12. The Health Board maintains that the information constitutes personal data as individuals would be identifiable from the information should it

be disclosed. In particular, the Health Board believes that other employees including colleagues of the individuals who have been suspended would be able to identify individuals.

13. The complainant has argued that, as the Health Board employs around 18,000 staff in 6 separate counties of North Wales, and in view of the fact that he has not requested the names of the individuals, nor the location that they worked it would not be possible to identify any individuals, and therefore that the information does not constitute personal data. He has further argued that, during the period covered by his request, individuals would have been absent from work for any number of reasons, including annual leave, maternity/paternity leave and study leave. As such, if an individual had been suspended for a period, it would be impossible for a colleague to identify any particular individual.
14. On the one hand, the Commissioner accepts that the withheld information does not show the actual identity or name of any individual, but simply details the job grade and other information relating to the individual's suspension. However, if a member of the general public was able to identify individuals by cross referencing the disclosed, 'anonymised' data with information already in the public domain, in the Commissioner's view the disclosed information would constitute personal data. Whether it would be possible to identify individuals from the 'anonymised' data is a question of fact based on the circumstances of the specific case.
15. The Commissioner recognises that the argument here is that disclosure of the withheld information may be combined with other information, already in the public domain or known in the community, which would therefore enable a picture to emerge, rather like piecing together a mosaic from apparently unrelated pieces.
16. The Commissioner has considered the arguments of both the Health Board and the complainant and he is mindful of the fact that whilst the complainant may not be able to link the information to an individual or individuals, disclosure under the FOIA is considered to be disclosure to the public at large. If the Health Board disclosed the information to the complainant under the FOIA, it should also be prepared to disclose the same information to any other person who asks for it.
17. The Commissioner notes that the Health Board employs around 18,000 staff across several sites, and less than 50 employees were suspended during the period in question. Whilst the Commissioner accepts that the refined request is for the duration of suspension as opposed to the dates to and from, the Commissioner is of the view that other employees of the Health Board, particularly colleagues of the suspended individuals

would be able to identify individuals if the information were disclosed. The Commissioner has reached this conclusion based on a number of factors including:

- In relation to individuals whose suspension was on-going at the time the request was made, the duration represents the period from the date they were suspended up to the date of the request (20 April 2012). As such, a person could calculate from this the start date of the suspension. Colleagues working with these suspended individuals would be likely to know the date from which their colleague was absent from work.
 - The periods of suspension are in some cases longer than normal annual leave periods, so any period of absence could not be misconstrued as annual leave, as the complainant has argued. Further, whilst it could be argued that longer periods of suspension were a result of maternity leave or study leave, the Commissioner considers that colleagues would be aware of any absence due to these reasons.
 - The Commissioner accepts that colleagues working closely with any suspended individual would be likely to be aware of the period of suspension, and possibly the reasons for the suspension, but they may not be aware of the outcome of the suspension, for example whether any warnings were issued to the employees. As such, disclosure of the requested information could reveal new information about the individuals to colleagues.
 - The Commissioner accepts that there will be a number of persons employed within the Health Board working at a particular grade, across several locations. However, many of the individuals would be working within small teams and the identification of individuals, based on the grade and the duration of suspension would be possible in these cases.
18. The Health Board also provided the Commissioner with examples to support its view that individuals could be identified if the information were disclosed. Inclusion of any detailed analysis of these examples is likely to reveal the content of the withheld information itself. The Commissioner has therefore produced a confidential annex which sets out in detail his findings in relation to this specific issue. This annex will be provided to the Health Board but not, for obvious reasons, to the complainant.
19. Although the Health Board did not specifically put forward the following argument, the Commissioner also considers that links to individuals might be drawn from the data through 'corroborating information'

known through local knowledge from family and friends, or other third parties who might have had dealings with any of the individuals to whom the information relates.

20. The Commissioner accepts that, to an extent, by removing the dates individuals were suspended to and from, and the reason for any suspension, the refinement of the request has to some extent reduced the risk of identifiability of the individuals in question. However, taking into account the above factors and those outlined within the confidential annex the Commissioner believes that it would be possible for individuals to be identified if the withheld information were disclosed and that this is more than a slight hypothetical possibility. Accordingly, the Commissioner is satisfied that the information requested does constitute personal data, within the definition at section 1(1) of the DPA.

Would disclosure breach one of the Data Protection principles?

21. The Health Board has argued that the withheld information is exempt under section 40(2) because disclosure would breach the first data protection principle. The first data protection principle has two components:

- personal data shall be processed fairly and lawfully; and
- personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

Would disclosure be fair?

22. The information requested is in essence a slightly refined request from that considered in the decision notice on case reference FS50423868, referred to in paragraph 7 above. The Health Board has submitted the same representations as to how disclosure would breach the first data protection principles in relation to both requests. In reaching a view on this case, the Commissioner has therefore referred to his analysis in the earlier decision notice, at paragraphs 22 to 30.
23. In considering whether disclosure of the information requested would comply with the first data protection principle, the Commissioner has first considered whether disclosure would be fair. In assessing fairness, the Commissioner has considered the reasonable expectations of the individuals concerned, the nature of those expectations and the consequences of disclosure to the individual. He has then balanced against these the general principles of accountability, transparency as well as any legitimate interests which arise from the specific circumstances of the case.

Expectations of the individuals concerned

24. The withheld information in this case relates to the time periods, reasons for and outcomes of suspensions over a specified period. Disclosure of information under the FOIA is disclosure to the public at large and not just to the complainant. The Commissioner recognises that people have a reasonable expectation that a public authority, in its role as a responsible data controller, will not disclose certain information and that it will respect confidentiality.
25. The Commissioner believes that employees of public authorities should be open to scrutiny and accountability and should expect to have some personal data about them released because their jobs are funded by the public purse. However, he considers that information which might be deemed 'HR information' (for example details of pension contributions, tax codes, etc) should remain private, even though such information relates to an employee's professional life, and not to their personal life.
26. The Commissioner considers that the information relevant to this case could be argued to fall into the category of HR information, because it relates to disciplinary/personnel matters, and his general view is that this type of information should remain private. The Commissioner is satisfied that the suspended individuals would have had a reasonable expectation that the details of the length of time and outcome of their suspensions would be kept confidential and not passed on to third parties without their consent.

Consequences of disclosure

27. In light of the nature of the information and the reasonable expectations of the individuals concerned, as noted above, the Commissioner is satisfied that release of the withheld information about the length of time, reasons for and outcome of suspensions would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the individuals in this case.

General principles of accountability and transparency

28. Notwithstanding a data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if there is a more compelling public interest in disclosure.
29. However, the Commissioner believes that the public's legitimate interests must be weighed against the prejudices to the rights, freedoms and legitimate interests of the members of staff concerned. The Commissioner accepts the Health Board's contention that these members of staff would have a strong expectation of privacy and

confidentiality over the details of disciplinary matters and information relating to their suspensions. The Commissioner also notes that there is no suggestion that the Health Board or the suspended individuals have placed any information about their suspensions into the public domain.

30. The Commissioner's conclusion is that disclosure of the requested information would enable private information to be deduced about individuals by others who possessed 'corroborating information'. The Commissioner finds that the suspended individuals would have a reasonable expectation that the information related to disciplinary proceedings would remain confidential. He has therefore concluded that it would be unfair to disclose the withheld information - in other words, disclosure would breach the first data protection principle. He therefore upholds the Health Board's application of the exemption at section 40(2).
31. As the Commissioner has determined that it would be unfair to disclose the requested information, it has not been necessary to go on to consider whether disclosure is lawful or whether one of the conditions in Schedule 2 of the DPA is met. The Commissioner therefore upholds the Health Board's application of the exemption provided at section 40(2) of the FOIA.

Right of appeal

32. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

33. 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.
34. 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

Anne Jones
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