

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 March 2013

Public Authority: York Teaching Hospital NHS Foundation Trust

Address: The York Hospital
Wigginton Road
York
YO31 8HE

Decision (including any steps ordered)

1. The complainant has requested information relating to a grievance they had raised. York Teaching Hospital (the 'Trust') refused the request under section 41 (information provided in confidence).
2. The Commissioner has investigated the complaint and found that all the information is exempt from disclosure under sections 40(1) and 40(2) of FOIA as it contains the personal data of the complainant and the personal data of third parties.
3. The Commissioner does not require the Trust to take any steps as a result of this decision notice.

Request and response

4. On 3 July 2012, the complainant wrote to the Trust and requested a full copy of the report that was produced as a result of the investigation held in February 2011.
5. The Trust responded on 8 August 2012. It confirmed that the information was held by the Trust but that it considered it was exempt by virtue of section 41 of the FOIA.
6. Following an internal review the Trust wrote to the complainant on 26 September 2012. It maintained its position that the information was exempt.

Scope of the case

7. The complainant first contacted the Commissioner on 31 July 2012 to complain about the way her request for information had been handled. The Trust initially dealt with the request under the Data Protection Act (DPA) 1998 as a subject access request.
8. The Trust had identified the complainant's personal data and responded accordingly. The Trust considered that the request for the full copy of the investigation report should be dealt with under the FOIA.
9. The Commissioner considers the scope of this case to be to determine if the Trust were correct to withhold the requested information. He notes that the Trust have cited section 41 of the FOIA, information provided in confidence. However, having viewed the withheld information the Commissioner considers the relevant exemption in this case to be section 40 of the FOIA. The Commissioner will consider the application of section 41 to any remaining information.

Reasons for decision

10. Where requested information constitutes the personal data of more than one individual, then all individuals are data subjects for the purposes of section 40. In situations where a request is made by one of the data subjects the Commissioner's approach is to consider the information under the section 40(1) exemption.
11. There is no right of access to personal data about oneself under FOIA, as section 40(1) provides that information is exempt if it constitutes personal data of which the applicant is the data subject. Personal data is defined in the DPA as:

"personal data" means data which relate to a living individual who can be identified-

(a) from those data, or

(b) from those data and other information which is the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

12. The complainant was the person who raised the grievance considered in the report. The report outlines her allegations and evidence she gave, which included how she felt she was being treated by other staff

members. The report details the history of the complainant's job and interactions with the individuals concerned. The complainant is clearly identifiable from the report and the information is significant and biographical to her. The Commissioner is satisfied that the information is her personal data.

13. The Commissioner therefore finds that section 40(1) is engaged and as this is an absolute exemption there is no public interest test to apply.
14. The Commissioner notes that the complainant made a subject access request for a 'copy of the full grievance investigation report'. Potentially, this means that some of the information could be released without disclosing the complainant's personal data. In this instance the Commissioner would say that should any of the information be found not to be the personal data of the complainant, or should it be possible to isolate any of the information in such a way that it is not the personal data of the complainant, then he would find that section 40(2) would apply.
15. Amongst other things, section 40(2) of the FOIA states that information which is the personal data of a third party (i.e. not the applicant) is exempt if a disclosure of the information would breach any of the data protection principles.
16. The Commissioner must therefore firstly consider whether the information is personal data. Secondly, if it is, he must consider whether that disclosure would breach any of the data protection principles of the DPA.
17. Having viewed the withheld information which by necessity includes witness statements from third parties, it is clear that it constitutes the personal data of the individuals who were the subject of the grievance and the investigation that was undertaken in response.
18. It is the Commissioner's view that the information clearly relates to the individuals who were the subject of the grievance. The individuals can be identified from that information and the Commissioner is satisfied that it is their personal data. The Commissioner also notes that some of the information is also the personal data of other individuals who were not a party to the grievance.
19. Having satisfied himself that the information is personal data the Commissioner has gone on to consider whether disclosure would contravene any of the data protection principles.
20. The Commissioner considers that the first principle is the most relevant in this case. The first principle states that personal data should be processed fairly and lawfully.

21. When considering whether a disclosure under FOIA would be fair the Commissioner's approach is to reach a balanced view after considering the following factors:
- Does the information relate to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life)?
 - Has the individual(s) named been asked whether they are willing to consent to the disclosure of their personal data?
 - The possible consequences of disclosure.
 - The reasonable expectations of the individual(s) about what will happen to their personal data.
22. In its submission to the Commissioner the Trust maintained that the investigation was conducted under the former Trust's Dignity at Work Policy, and assurances were given to participants that their evidence would be treated in strict confidence. It therefore follows that those participants would have had a reasonable expectation that their personal data would not be made public.
23. The Commissioner notes that the report relates to allegations about the activities of the individuals during their working lives, as opposed to their personal lives. However, he also notes that there are certain elements within the report that relate to their home and family lives. The Commissioner considers that disclosure of such information would be likely to be distressing to these individuals and he is also mindful of the fact that the allegations considered in the report were found to be unproven.
24. The Commissioner's approach in cases like this is that, notwithstanding the data subject's reasonable expectations or any damage or distress caused to him or her by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in releasing the information. Therefore the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the data subject against the public interest in disclosure.
25. The Commissioner would stress that this is a difference balancing exercise than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Given the importance of protecting an individual's personal data the Commissioner's 'default position' is in favour of protecting the privacy of the individual. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure; that is to say any public interest in disclosure must outweigh the public interest in protecting the rights and freedoms of the data subjects.

26. The Commissioner acknowledges that there is a public interest in a grievance investigation being seen to be reasonable, fair and impartial. Whilst the Commissioner accepts that there is a public interest in knowing that allegations of this nature are investigated appropriately, he notes that the complainant has been provided with a summary of the investigation and information such as identifying causes that led to the situation and steps taken to ensure such things are managed appropriately in future. The Commissioner's view is that given the strong expectations of privacy and the likely distress that disclosure would cause, the disclosure of the requested information would be disproportionate. Consequently, the Commissioner is satisfied that the section 40(2) exemption is also engaged in respect of the other individuals named in the report.
27. Having decided that section 40 is engaged, the Commissioner has therefore not considered the application of section 41.

Right of appeal

28. 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

29. 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.
30. 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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