

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **2 November 2015**

Public Authority: **Berkshire Healthcare NHS Foundation Trust
(the Trust)**

Address: **Fitzwilliam House
2nd/3rd Floors
Skimped Hill lane
Bracknell
Berkshire
RG12 1BQ**

Decision (including any steps ordered)

1. The complainant has requested information relating to a particular recruitment process undertaken by the Trust. The Trust said that some of the requested information was in the public domain, it said that some information was exempt under section 40(1) FOIA and some was exempt under section 40(2) FOIA.
2. The Commissioner's decision is that the Trust has correctly applied section 40(1) and 40(2) FOIA to the withheld information. The Commissioner does not consider that the Trust has made it clear as to whether or not the information which the Trust said was in the public domain is still in the public domain. It has not provided any links to this information or explained where it can be accessed. As no exemptions have been applied to this information, the Commissioner considers that it should be provided to the complainant.
3. The Commissioner requires the Trust to provide the complainant with a copy of the advertisement, job description and person specification to the complainant which it has said was in the public domain.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 4 August 2015 the complainant made the following request for information under the FOIA for:
 - "1. Can you provide reasons for not providing a depersonalised copy of the successful candidates application?. I request this information under the Freedom of Information Act and you have a statutory obligation to provide this.
 2. I do have the NHS experience required as I have worked both within the internal and external audit assignments whilst working for Grant Thornton. I am fully conversant with NHS governance frameworks.
 3. I would like all information pertinent to this recruitment process ie shortlisting methods / notes."
6. On 6 August 2015 the Trust responded. It refused to provide the information requested at parts 1 and 3 of the request as it said it was exempt under FOIA as it contained personal data.
7. The complainant requested an internal review on 18 August 2015. The Trust sent the outcome of its internal review on 19 August 2015. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 22 September 2015 to complain about the way his request for information had been handled.
9. The Commissioner considers that the Trust responded to the FOIA requests contained at parts 1 and 3 of the complainant's correspondence. The Commissioner does not consider that part 2 of the correspondence was an FOIA request.
10. During the course of the Commissioner's investigation the Trust confirmed that the personal data contained within the withheld information was that of the requester as well as other third parties. It was therefore relying upon section 40(1) and section 40(2) FOIA to withhold the requested information.

11. The Trust explained that it holds the application forms of two short-listed candidates in addition to the successful candidate and the complainant. However the Trust said that it did not interpret the request as covering the information in the other two short-listed application forms or corresponding interview notes.
12. The Commissioner considers that the wording of part 3 of the complainant's request is extremely broad and that the two other short-listed application forms would be classed as information pertinent to this recruitment process. The Commissioner does not consider that the examples of the type of information required, shortlisting methods/notes is exhaustive and the two other short-listed application forms should have been considered as part of the request. The Commissioner has therefore considered the two other short-listed application forms/interview assessments in the same way he has considered the information pertinent to the successful application under section 40(2) FOIA given his dual role to regulation the Data Protection Act 1998 (DPA) as well as the FOIA.
13. The Trust also explained that it does now hold a spreadsheet document entitled "Manager's shortlisting review", which scores the applications of the complainant and the short-listed candidates against the job specification. However it said that this document was created after the date of the FOIA request, as part of the Trust's internal review of the recruitment process and therefore the Trust did not treat this as falling within the scope of this request. As this information was created after the complainant's FOIA request was made, the Commissioner considers that it would not fall within the scope of the request.
14. Finally the Trust said that other documents it holds in relation to this recruitment process include the advert for the post and the job description/person specification, which were in the public domain.
15. The Commissioner accepts that whilst these documents were in the public domain during the advertisement stage of the recruitment process, it is not clear if this information is still in the public domain. As the Trust has not applied an exception to this information or clarified exactly where this information can currently be publicly accessed, the Commissioner considers that this information should have been provided to the complainant.
16. The Commissioner has therefore considered the Trust's application of section 40(1) and section 40(2) to the four application forms it holds relevant to this particular recruitment process and the corresponding interview assessment sheets.

Reasons for decision

Section 40(1)

17. Under section 40(1), the personal data of the complainant is absolutely exempt from disclosure under FOIA.
18. The Trust has withheld the complainant's own application form and interview assessment under this exemption.
19. Personal data is defined in section 1(1) of the Data Protection Act (DPA) as:
 - "data which relate to a living individual who can be identified –
 - (i) from those data, or
 - (ii) from those data and other information which is in 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 intention of the data controller or any other person in respect of the individual."
20. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
21. The Commissioner considers that the complainant would be identifiable from his own application form and interview assessment. It is therefore absolutely exempt from disclosure under section 40(1) FOIA.

Section 40(2)

22. Under section 40(2) by virtue of section 40(3)(a)(i), personal data of a third party can be withheld if it would breach any of the data protection principles to disclose it.
23. The definition of personal data has been set out at paragraphs 19 and 20 above.
24. The Trust has withheld the three application forms of the short-listed candidates (one of which was ultimately the successful candidate). It has also withheld the corresponding interview assessments. The Commissioner considers the information withheld under section 40(2) is

information from which the data subjects (the applicants) would be identifiable.

25. The Trust said that the information also includes some sensitive personal data within the monitoring information (equality and diversity monitoring) and safeguarding sections of the application form. This includes data about the individual's health/disability, sexual orientation and ethnic origin.
26. Personal data is exempt if either of the conditions set out in sections 40(3) and 40(4) of FOIA are met. The relevant condition in this case is at section 40(3)(a)(i) of FOIA, where disclosure would breach any of the data protection principles. In this case the Commissioner has considered whether disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully". Furthermore at least one of the conditions in Schedule 2 should be met. In addition for sensitive personal data at least one of the conditions in Schedule 3 should be met.

Likely expectation of the data subject

27. The Trust said that the withheld information contains some information primarily relevant to the data subject's private life, in particular the sensitive personal data described above. As regards information such as details of qualifications and dates and descriptions of past employment, it said that these are relevant to the individuals in terms of their working life and assessment of suitability for the post applied for. However they do not in themselves relate to public life in terms of being about the individual's current performance as a public sector employee or their accountability for performance of a public function.
28. In addition, in general the Trust would not consider assessments of an individual's competence or performance to be routinely disclosable, even in relation to current employees in very senior roles. It said that while this post was at a management level in the Trust, it is not a very senior post and not at a level where public accountability for performance would be expected even from an individual in post.
29. The Trust also considers that there is a clear difference between what might be expected in terms of disclosure by individuals appointed to a role within a public sector organisation and those applying for such roles, particularly below senior officer level. The Trust considers that individuals would expect their applications, and their performance at interview, to be assessed privately.

Damage and distress

30. The Trust said that disclosure of the sensitive personal data contained in the application forms is clearly likely to cause distress to some of the individuals.

Schedule 2 - The legitimate public interest

31. The Trust does not see a clear general public interest in understanding the details of the performance and capability assessments carried out in relation to these individuals.

Schedule 3

32. The Trust acknowledged that for the sensitive personal data to be disclosed a relevant condition in Schedule 3 would need to be identified, but it does not consider that any of the Schedule 3 conditions apply in this case with regard to disclosure into the public domain.
33. The Commissioner considers that there is a strong and reasonable expectation, on behalf of candidates, that when submitting an application form within a recruitment process and when attending interview, this information will be handled sensitively and privately and will not be shared publicly. This is particularly so as the position applied for relevant to this case was not a very senior role. The Commissioner does not therefore consider that the data subjects in this case, would expect that their application forms or interview assessment notes would be put into the public domain. The Commissioner considers that the reasonable expectations would be the same for the successful and unsuccessful candidates.
34. The Commissioner considers that whilst there is a legitimate public interest in the disclosure of information which would provide greater understanding and transparency behind the recruitment process, he does not consider that this would outweigh the data subject's strong reasonable expectations as to how this information would be processed and the need to avoid the potential distress disclosure would cause if the sensitive personal data were disclosed.
35. Finally in relation to the sensitive personal data contained in the application forms, the Commissioner does not consider that a schedule 3 condition would be met.
36. The Commissioner therefore considers section 40(2) FOIA was therefore correctly applied in this case.

Right of appeal

37. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

38. 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.
39. 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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