

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 April 2017

Public Authority: King's College Hospital NHS Foundation Trust
Address: Denmark Hill
London SE5 9RS

Complainant: Mick Vakante
Address: 63 Ermine Road
London SE13 7JJ

Decision (including any steps ordered)

1. The complainant has requested information from King's College Hospital NHS Foundation Trust ('the Trust') about contact it may have received from a school about a particular pupil. The Trust has said that the requested information is exempt from release under section 40(2) of the FOIA as it is the personal data of a third person.
2. The Commissioner considers that the Trust incorrectly applied section 40(2) to the request. The Commissioner has decided that under section 40(5)(b)(i) of the FOIA, the Trust is not obliged to confirm or deny that it holds the requested information as to do so would release the personal data of a third person.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. The complainant has told the Commissioner that he considers there has been a 'cover-up' regarding Safeguarding Children failures by a particular school and by the local Council's Children's Services. He says that as a result of raising concerns about these failures – which appear to concern one particular pupil – he was sacked from his role at the school in question.

5. On 6 September, the complainant wrote to the Trust and requested information in the following terms:

"Did manageress [Redacted] make ANY contact with your hospital regarding the [Redacted] pupil during the period of year 2015 and ending in February 2016?"

She claims that your hospital doctors did not cooperate with the school and did not return her numerous phone calls related to the health of this pupil."

6. The Trust responded on 28 September 2016. It said that the information the complainant has requested is exempt from disclosure under the FOIA, under section 40(2).
7. Following an internal review the Trust wrote to the complainant on 12 October 2016. It confirmed that it did not consider this was a matter to be addressed under the FOIA as it relates to a named individual.

Scope of the case

8. The complainant contacted the Commissioner on 10 November 2016 to complain about the way his request for information had been handled.
9. The Commissioner's investigation has focussed on the Trust's handling of the request; whether it is a request for a third person's personal data and whether section 40(2) or section 40(5) applies to the request.

Reasons for decision

Section 40 – personal data

10. Section 1 of the FOIA provides two distinct but related rights of access to information that impose corresponding duties on public authorities:
 - a) the duty to inform the applicant whether or not requested information is held and, if so
 - b) the duty to communicate the information to the applicant.
11. Section 40(2) of the FOIA, which the Trust applied to the request, says that information is exempt from release if it is the personal data of a third person (ie someone other than the applicant) and if one of the conditions under section 40(3) or section 40(4) are met.

12. By applying section 40(2) to the request the Trust appears to indicate that it holds information relating to a particular pupil at a school namely that the pupil was the subject of contact between the school and the Trust, regarding the health of that pupil.
13. In the Commissioner's view, the Trust should have applied section 40(5)(b)(i) to the request. Section 40(5)(b)(i) says that a public authority is not obliged to confirm or deny that it holds information if, by confirming or denying it is held, the authority would breach one of the data protection principles.
14. This subsection is about the consequences of confirming or denying whether information is held, and not about the content of the information. The criterion for engaging it is not whether disclosing the information would contravene data protection principles, but whether the simple action of confirming or denying that it is held would do so.
15. The Commissioner's guidance on section 40(5) explains that there may be circumstances, for example for information about criminal investigations or disciplinary records, in which simply to confirm whether or not a public authority holds that information about an individual can itself reveal something about that individual. To either confirm or deny that information is held could indicate that a person is or is not the subject of a criminal investigation or a disciplinary process. In this case, appearing to confirm that the requested information is held indicates that a particular pupil's health was the subject of contact between his or her school and the Trust.
16. For section 40(5)(b)(i) to apply to a request the following conditions must be met:
 - confirming or denying whether information is held would reveal the personal data of a third person; and
 - confirming or denying whether information is held would contravene one of the data protection principles.
17. The Commissioner has first considered whether confirming or denying relevant information is held would reveal the personal data of a third person as defined by the Data Protection Act (DPA).

Is the information personal data?

18. The DPA says that for data to constitute personal data, it must relate to a living individual and that individual must be identifiable from it.
19. The requested information in this case, if held, would appear to relate to a living individual and, if held, is likely to refer to the pupil concerned by

name and to be held within that pupil's patient record. The pupil concerned could therefore be identified from it. The Commissioner is satisfied that, if held, the requested information would be the pupil's personal data. She has gone on to consider section 40(3) in the first instance, which concerns release of personal data and the Data Protection Act.

Would confirming or denying the information is held contravene one of the data protection principles?

20. Section 40(3)(a) says that personal data is exempt from release if disclosing it would contravene any of the data protection principles, or would cause damage or distress and so breach section 10 of the DPA.
21. The Commissioner has considered whether confirming or denying the requested information is held would breach the first data protection principle: that personal data *'shall be processed fairly and lawfully...'*
22. When assessing whether confirming or denying information is held would be unfair, and so constitute a breach of the first data protection principle, the Commissioner takes into account factors such as whether the information relates to their public or private life, whether it is sensitive personal data, whether the individual has consented to the authority confirming or denying the information is held, and their reasonable expectations about what will happen to their personal data.
23. If held, the information concerns a living individual's private life. In addition, the information could be categorised as sensitive personal data as it concerns the health of an individual. Individuals will regard their sensitive personal data as their most private information. Consequently, the Commissioner considers that the individual in this case would have the reasonable expectation that their sensitive personal data would not be released to the world at large under the FOIA, through the Trust confirming or denying that the requested information is held.
24. The Commissioner therefore considers that confirming or denying the requested information is held would be unfair to the individual concerned; that is the particular pupil. That pupil would reasonably expect that their sensitive personal data – whether his or her school has been in touch with Trust about their health – would not be released to the world at large and that it would cause him or her a degree of damage or distress if confirmation or denial were given.
25. Despite the factors above, an authority may confirm or deny information is held if there is compelling public interest in doing so that would outweigh the legitimate interests of the data subject; the pupil in this case.

Balancing the individual's rights and freedoms against the legitimate interest in confirming or denying information is held

26. Given his background to the request, and his concerns, the Commissioner recognises that the information in question is of interest to the complainant. However, the complainant has not provided evidence for confirmation or denial that the information is held that is so compelling that it overrides the data subject's legitimate rights and freedoms.
27. The Trust advised the complainant to discuss his concerns with the school's Safeguarding lead and, if he remained dissatisfied, to ask for his concerns to be referred to the Local Authority Designated Officer. Addressing his concerns through these routes – which the Commissioner understands he is doing - would appear to be an appropriate course of action for the complainant.
28. The Commissioner has noted that, by applying section 40(2) to the request, the Trust appeared to confirm that it holds related information. The Commissioner is satisfied that, under section 40(5)(b)(i) of the FOIA, the Trust was not obliged to confirm or deny that it holds the information the complainant has requested. Doing so would release the sensitive personal data of a third person, which would be unfair and a breach of the first data protection principle. It would also be likely to cause the data subject damage or distress and so breach section 10 of the DPA.

Right of appeal

29. 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

30. 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.
31. 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
Group Manager
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Wycliffe House
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