

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 December 2013

Public Authority: Nottinghamshire Healthcare NHS Trust
Address: Duncan Macmillan House, Porchester Road
Nottingham NG3 6AA

Decision (including any steps ordered)

1. The complainant has requested information relating to a review of the Bassetlaw Out Of Hours (OOH) Service.
2. The Commissioner's decision is that Nottinghamshire Healthcare NHS Trust (the Trust) has correctly applied section 40(2) to the withheld information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 19 December 2012, the complainant wrote to the Trust and requested information in the following terms:

"I am assuming that you have fed back the investigation findings to the team by now. I have not received anything which I can only presume is an oversight. Could you forward me a copy of the report please."
5. The Trust responded on the same day advising that a copy of the recommendations should already have been posted to the complainant.
6. On 27 December 2012 the complainant wrote to the Trust again stating that he had received some information but that this was confusing as there was no author, date or timeframes. The complainant requested a full copy of the report.
7. The Trust responded, also on 27 December 2012 and stated that the full report was confidential and that it would not be appropriate to share it with the complainant.

8. The complainant wrote to the Trust on 7 January 2013 asking for the full report. The Trust responded on 24 January 2013 and stated that the full report was exempt from access via the Freedom of Information Act.
9. On 24 February 2013 the complainant requested an internal review. Following intervention by the Commissioner the Trust carried out an internal review and wrote to the complainant on 28 June 2013.
10. It refused to provide the requested information citing the following exemptions: section 36; section 40 and section 41 as its basis for doing so.

Scope of the case

11. The complainant originally contacted the Commissioner on 9 April 2013 to complain about the delay in the Trust carrying out its internal review.
12. Following completion of the internal review the complainant contacted the Commissioner again on 7 June 2013 to complain about the way his request for information had been handled.
13. The full report is over 800 pages long and contains summaries of the interviews held and other content, from which the Trust considers the source would be readily identifiable. The Trust has applied section 40(2) to all the withheld information, as well as sections 36 and 41 to some parts of the information. A list of the withheld information is contained in a confidential annex. The Commissioner considers the scope of this case to be to determine if the Trust correctly applied the exemptions it has cited to the withheld information.

Reasons for decision

Section 40(2) – Third party personal data

14. Section 40(2) of the FOIA provides an exemption for information that is the personal data of an individual other than the requester, and where the disclosure of that personal data would be in breach of any of the data protection principles. Consideration of this exemption is a two-stage process. First, the information in question must be the personal data of an individual aside from the requester and secondly, disclosure of that personal data must be in breach of at least one of the data protection principles.

Is the withheld information personal data?

15. Personal data is defined by section 1 of the Data Protection Act 1998 ("the DPA") as:

"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 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 data controller or any person in respect of the individual"

16. The request is for a full copy of a report, which includes statements from members of Trust staff and also names individuals where conflicts have arisen. The report also gives details relating to shift patterns, as well as individual's working practices.
17. Clearly, this type of information both relates to and identifies the individuals who took part in the review. It is the Commissioner's view that all the information would be the personal data of the staff who took part in the review.

Would disclosure breach the data protection principles?

18. The data protection principles are set out in schedule 1 of the DPA. The first principle, and the most relevant in this case, states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the data subject and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

Reasonable expectations of the data subject

19. When considering whether a disclosure of personal information is fair, it is important to take account of whether the disclosure would be within the reasonable expectations of the data subject. However, their expectations do not necessarily determine the issue of whether the disclosure would be fair.
20. Public authorities need to decide objectively what would be a reasonable expectation in the circumstances. In this case, the Trust has explained

that the data withheld under section 40(2) either relates to, is obviously about, or is linked to the individual data subjects.

21. It has further stated that it considered that disclosing the data, which was sought from data subjects on the express basis that it would remain confidential, would be extremely unfair. This is not only because the Trust, which owes a duty of trust and confidence to its employees, would be renegeing on the express undertaking given.
22. Furthermore, the unfairness would be compounded by the nature of much of the information provided which includes sensitive disclosures by members of staff about working practices within the service and opinions about colleagues.
23. The Trust has not sought the consent of the data subjects to disclose the information as it considered that this would be a futile exercise, given that the information is highly sensitive. In addition, it considered that approaching staff for their consent would be likely to cause undue disruption and concern.

Consequences of disclosure

24. The Trust has stated that by disclosing the information it would be likely to cause significant embarrassment and have a detrimental impact on working relationships which would impact on the functioning of the service, and potentially patient care.

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

25. The Trust has also taken into account any legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the data subjects involved. It considered that the public interest is best served by allowing the Trust to effectively investigate issues with its service and to implement recommendations which will improve the functioning of that service for the benefit of the public.

Conclusion

26. There is always some legitimate public interest in the disclosure of any information held by public authorities. This is because disclosure of information helps to promote transparency and accountability amongst public authorities. This in turn may assist members of the public in understanding decisions taken by public authorities and perhaps even to participate more in decision-making processes. However, having considered the circumstances of this case, the Commissioner's view is

that the right to privacy outweighs the legitimate public interest in providing a full copy of the report.

27. The Commissioner has considered that releasing this information would not be within the expectations of the Trust's employees, who would not reasonably expect personal information such as their opinions on the service and their colleagues to be released into the public domain, particularly if there is a possibility of a specific individual being identified.
28. Having reviewed the data that the Trust has so far released to the complainant, it seems likely that there would be a reasonable possibility of a specific employee being identified. This is because of the small number of employees that work in the OOH service.
29. The Commissioner has further considered that whilst there is a strong public interest in employee details such as salary bands and specific duties being disclosed publically, there is less public interest in a review of a department's practices and internal politics. The Commissioner considers that such information is unlikely to be related to their role within the Trust, and as such holds limited public value.
30. In view of the above, the Commissioner finds that disclosing the information withheld by virtue of section 40(2) would contravene the first data protection principal because it would be unfair. The Trust was therefore correct to refuse to disclose this information
31. Given that the Commissioner finds that all the information is exempt by virtue of section 40, he has not gone on to consider the application of section 36 or 41.

Other matters

32. The Trust has acknowledged that the complainant's requests of 19 December 2012 and 24 February 2013 had not been construed as requests under FOIA, and therefore had not been addressed through its normal processes. With the benefit of hindsight, the Trust stated that this should have been recognised or clarified by those concerned, and as such apologised for the delay in responding.

Right of appeal

33. 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

34. 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.
35. 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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