

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **31 March 2014**

Public Authority: **Powys Teaching Health Board**
Address: **Powys Health Board Headquarters**
Mansion House
Bronylls
Brecon
Powys
LD3 0LS

Decision (including any steps ordered)

1. The complainant has requested documents involving her late father and her subsequent complaint regarding his treatment, from Powys Teaching Health Board ('the Health Board'). The Health Board provided most of the information but refused the rest by virtue of section 41 and section 40(2) of the FOIA.
2. The Commissioner's decision is that the Health Board correctly relied on section 40(2) of the FOIA in respect of documents 1, 11 and 254. However, the Health Board incorrectly applied section 41 of the FOIA as it should have considered this information under section 40(1) of the FOIA instead.

Request and response

3. On 20 December 2010, the complainant wrote to the Health Board and requested the following information:

"... all documents...other than medical case notes, involving my late father [name of late father] and my subsequent complaint on his treatment.

This will include interviews with staff (redacted), emails, memoranda, files and handwritten notes.

And obviously including any communication between [named individual A] and [named individual B], or their offices."

4. The Health Board responded on 15 December 2010. It confirmed that it had not included within her current request the information falling within the scope of her previous request of January 2009, and had therefore only reviewed the documentation held from the close of the previous FOIA request on 11 February 2009 to the date it received her current request (19 November 2010). It enclosed some information but confirmed that it was withholding one document which it considered exempt under section 41 of the FOIA.
5. Following an internal review the Health Board wrote to the complainant on 23 March 2011. The Health Board confirmed that it had identified additional information falling within the scope of the request, relating to the period from 1 February 2009 to 26 February 2009 which had not previously been considered. It further confirmed that it was withholding some of these documents on the basis of section 41 and section 40(2) of the FOIA but did however enclose the remainder with its response.

Scope of the case

6. The complainant contacted the Commissioner on 30 March 2011 to complain about the way her request for information had been handled. She expressed concern with both the Health Board's record keeping and its use of the exemptions cited. She also requested a brief description of the content of the documents so that she could make a more informed decision. Such action does not in itself form part of the role of the Information Commissioner, however he contacted the Health Board to ask whether they could provide a description of the documents for the complainant. This was done and the description was provided to the complainant by the Commissioner in his letter to her of 16 December 2011.
7. The Commissioner commenced an investigation and wrote to the complainant on 17 November 2011, informing her that he considered the information contained in documents nine and ten (withheld on the basis of section 41 of the FOIA), consisted of the complainant's own

personal information and consequently fell to be considered under the Data Protection Act 1998 ('the DPA') instead. The Commissioner therefore arranged for a data protection complaint to be set up to consider this matter.

8. The complainant confirmed to the Commissioner that if she received a copy of the information contained in documents nine and ten, she would not require a decision notice to be issued by way of resolution to her FOIA complaint. The Commissioner heard nothing further from the complainant and the FOIA complaint was subsequently closed as it was assumed that she was satisfied with the outcome of her data protection complaint.
9. However, the complainant contacted the Commissioner on 20 November 2013 asking whether a decision notice had ever been issued in respect of her FOIA complaint. The Commissioner confirmed that it had not, and that he would now proceed to issue a decision notice in respect of her FOIA complaint, hence this present notice.
10. The Health Board provided the complainant with documents two to eight of her request and confirmed that it had sent a redacted copy of document 11 to the complainant on 7 December 2011. This information did not therefore form part of the Commissioner's investigation.
11. The Commissioner considers the withheld information to comprise:-
 - Minimal redactions from documents 1, 11, 12 and 254
 - Documents 9 and 10 in their entirety
12. The Commissioner notes that the redaction in document 12 which was originally refused on the basis of section 40(2) was subsequently determined to be outside of the scope of the request by the Health Board, as it was unrelated to the request. The Commissioner has considered this redaction and agrees that it is outside of the scope of this request.
13. The Commissioner therefore considers the scope of the investigation to be whether or not the Health Board was correct in withholding information from documents 1, 11 and 254, and in withholding documents 9 and 10 in their entirety.

Reasons for decision

Documents 1, 11 and 254

Section 40(2) - personal information

14. 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 would breach any of the data protection principles.
15. In order to reach a view regarding the application of this exemption, the Commissioner has firstly considered whether the requested information does in fact constitute personal data as defined by section 1(1) of the DPA.

Is the requested information personal data?

16. Personal data is defined at section 1(1) of the DPA as:

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

- (a) from those data,*
- (b) from those data and other information which is in the possession of, or 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."*

17. When considering whether the information is personal data, the Commissioner has taken into consideration his published guidance: *"Determining what is personal data"*.¹
18. On the basis of this guidance, there are two questions that need to be considered when deciding whether disclosure of information into the public domain would constitute the disclosure of personal data:
 - (i) "Can a living individual be identified from the data, or, from the data and other information in the possession of, or likely to come into the possession of, the members of the public?"*
 - (ii) Does the data 'relate to' the identifiable living individual, whether in personal or family life, business or profession?"*

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http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/what_is_data_for_the_purposes_of_the_dpa.pdf

19. The Commissioner notes that the information withheld under this exemption relates to three documents. Redacted copies of these were sent to the complainant, although he notes that the third was initially withheld in its entirety by the Health Board.
20. The redactions / withheld information are as follows:
 - Documents 1 and 11 - the name of an individual within an email.
 - Document 254 - the name and contact details of the sender of the email, and the names of the email recipients.
21. Having considered the information, the Commissioner is satisfied that the redactions in documents 1 and 11, and the names and contact details in document 254 do constitute the personal information of the individual(s) concerned.
22. As the Commissioner is satisfied that the information outlined in paragraph 21 of this notice constitutes personal information, he has therefore gone on to consider whether disclosure would breach any of the data protection principles. The Health Board considers that disclosure of the requested information would breach the first principle of the DPA.

Would disclosure contravene the first data protection principle?

23. The first data protection principle requires that the processing of personal data be fair and lawful and,
 - a. at least one of the conditions in schedule 2 is met, and
 - b. in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.
24. In the case of personal data, both requirements (fair and lawful processing, and a schedule 2 condition) must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data principle.

Would disclosure be fair?

25. 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.

The reasonable expectations of the data subjects

26. The Commissioner's guidance regarding section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private life.² Although the guidance acknowledges that there are no hard and fast rules it states that:

"Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned."

27. The Commissioner's guidance therefore makes it clear that where the information relates to the individual's private life (i.e. their home, family, social life or finances) it will deserve more protection than information about them acting in an official or work capacity (i.e. their public life).
28. However, whilst the requested information relates to the data subject's professional life, not all information relating to an individual's professional or public role is automatically suitable for disclosure.
29. The Commissioner has considered the disclosure of the personal data of the two different groups of individuals below:

(i) ***The name and contact details of an individual – documents 1, 11 and 254***

30. Here, the personal information is the name and contact details of a particular individual. The Commissioner notes that in this context the individual had no expectation that their details would be made public, in fact the individual expressly refused to give consent for their disclosure.

²http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Detailed_speci alist_guides/PERSONAL_INFORMATION.ashx

Consequences of disclosure

31. The Commissioner has considered the consequences of disclosure of the information and notes that the information was provided to the Health Board in confidence. Disclosure may therefore result in the third party being reluctant to provide advice to the Health Board (or other public authorities) in the future. Additionally, there is also a risk that the third party could be contacted directly if the information was disclosed.

The legitimate public interest in disclosure

32. Notwithstanding data subjects' reasonable expectations, or any damage or distress caused to them by disclosure, it may still be fair to disclose requested information if it can be argued that there is a more compelling public interest in disclosure.
33. Although the broad general principles of accountability and transparency of public sector organisations may be applicable in this case, it is not clear what public interest would be served from disclosure to the world at large of these details. The information was obtained from a third party in response to the complainant's concerns regarding the Health Board and does not relate directly to the investigation itself.
34. In weighing up the balance between the reasonable expectations of the data subject and the consequences of disclosure of this personal information against a more general legitimate public interest in disclosure, the Commissioner considers that the balance is weighted in favour of the data subject. The Commissioner is therefore satisfied that the Health Board's reliance on section 40(2) was correct in this instance.

(ii) Names of four officers – document 254

35. In this group, the officers in question occupy different posts within the Health Board, from very senior down to more junior positions. In general, the Commissioner considers that while senior officers would be likely to have a greater expectation that their personal data would be disclosed, more junior officials would have a greater expectation of privacy, with their names not being disclosed to the public at large. The Commissioner has a long established position that the personal data of junior officials whose roles are not public facing is that they are not normally disclosable, and he sees no reason to depart from that position here. Consequently, the Commissioner has decided it would not be fair to disclose the names of the more junior members of staff.
36. The Commissioner has gone on to consider the implications of revealing the name of the more senior officials and whether disclosure would be unfair to them. The disclosure of these names would be likely to further

promote openness and transparency in the actions and deliberations of the Health Board, and as noted above senior members of staff are likely to have a greater expectation of their personal data being disclosed.

37. 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.
38. However, the Commissioner notes that a redacted copy of document 254 has been disclosed under the FOIA and he considers that to a large extent the legitimate interests of the public have been satisfied through disclosure of that information. He considers that very little would be added by disclosing these names.
39. Furthermore, the fact that these individuals were recipients of the document rather than its originator means that they did not themselves contribute to its content, and the Commissioner's view is that the legitimate interest in releasing the names is again lessened.
40. Having considered the circumstances of this case, the Commissioner does not see a compelling legitimate interest in the disclosure of the senior officials' names and his view is consequently that the Health Board was correct to withhold them.
41. The Commissioner considers that with regard to this information as well, the balance is weighted in favour of the data subjects. The Commissioner is therefore satisfied that the Health Board's reliance on section 40(2) was correct in this instance.

Documents 9 and 10

Section 40(1) – personal information of the requester

42. Section 40(1) of FOIA provides an exemption for information that constitutes the personal data of the requester and states:

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

43. Section 40(1) is an absolute exemption from the FOIA, which means that there is no requirement to consider the public interest test before

deciding whether the exemption applies. In other words, if the information is the personal data of the person making the request, it is exempt from disclosure under FOIA and falls to be considered under the DPA instead.

44. The Commissioner is satisfied that the information contained in documents 9 and 10 does constitute personal information as outlined in paragraphs 16 to 18 of this notice, and that it is information which identifies the requester. The Commissioner considers that any decision as to whether or not an individual is entitled to be provided with their own personal data should be made in accordance with the DPA, and that the Health Board should therefore have considered this information as a subject access request under section 7 of the DPA rather than under section 41 of FOIA.
45. The Commissioner has already undertaken a DPA assessment under his case reference RFA0424841 and the outcome has been communicated to the parties involved.

Other matters

The internal review

46. Whilst there are no timescales specified in the FOIA for the communication of the internal review, the Section 45 Code of Practice recommends that the internal review should be considered promptly.
47. The Commissioner has also produced guidance in relation to this matter and considers 20 working days from the date of the request for a review to be a reasonable time in most cases. He does nevertheless recognise that there may be a small number of cases where it may be reasonable to take longer. The Commissioner's view is that no review should exceed 40 working days and, as a matter of good practice, the Commissioner expects the public authorities to notify the applicants in cases where more time is needed and to provide an explanation of why that is the case.
48. The Commissioner notes that the complainant requested an internal review on 22 December 2010. However, as stated in paragraph 5 of this notice, the Health Board did not communicate the outcome of its internal review until 23 March 2011.
49. The Commissioner considers that this is an unacceptable delay taking no account of either the section 45 Code of Practice or his own guidance on the matter.

Right of appeal

50. 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: GRC@hmcts.gsi.gov.uk

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

51. 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.
52. 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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