

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 March 2015

Public Authority: Pennine Care NHS Foundation Trust
Address: 225 Old Street
Ashton- under-Lyne
Lancashire
OL6 7SR

Decision (including any steps ordered)

1. The complainant has requested information contained in a report of an investigation conducted by the HR department and which relates to the care of his late mother. The Pennine Care NHS Foundation Trust (the Trust) provided some information outside the scope of FOIA, but withheld the remainder under section 40(2) – third party personal data.
2. The Commissioner's decision is that the withheld information is exempt under section 40(2).
3. The Commissioner does not require the public authority to take any further action in this matter.

Request and response

4. On 25 April 2014 the complainant wrote to the Trust regarding his concerns over the care of his late mother. He went on to request information of the following description under the FOIA and the Data Protection Act 1998 (DPA):

"... all medical reports, electronic communication, email, documentation, letters relating to her treatment from the following organisations –

- (1) Pennine care district nurses & health visitors
- (2) Urgent Community Care Health Team, Nursing staff

- (3) Carders Court Assessment Centre Rochdale – (Bupa owned – Pennine Care sent my mother there in September 2012)
 - (4) Pennine Complaints Team – ongoing complaint – NHS ref –ref MB/HMR/FC464/12.”
5. The Trust responded on the 5 June 2014. It provided information in response to requests (1) and (2) under the DPA and the Access to Health Records Act 1990 (AHRA). The AHRA provides a right of access to the health records of the deceased, but only to the deceased’s personal representative. It advised him to seek the information requested at point (3) directly from BUPA. Finally the Trust informed the complainant that the complaints file (which it later referred to more accurately as the HR investigation report) held by the Complaints Team was to follow.
6. The complainant wrote to the Trust again on the 1 July 2014 and identified documents which were missing from the Trust’s initial response in respect of the responses to requests (1) and (2). He also stressed that he was seeking to exercise his right of access to information under FOIA and the DPA.
7. On 18 July 2014 the Trust responded to his queries. In respect of his right of access to the HR investigation report the Trust informed him that the information was exempt under section 40(2) on the basis that it was the personal data of another person. This prompted the complainant to ask for a copy of the report with any references to third parties redacted. On the 19 September 2014 the Trust provided the complainant with a redacted copy of the report. This information was provided under the terms of the DPA.
8. The complainant emailed the Trust on 29 September 2014 concerning how it had handled his requests and posed specific questions regarding the information which had been redacted from the HR investigation report. This constitutes a request for an internal review under FOIA.
9. The Trust provided the outcome of its internal review on 29 October 2014. The Trust explained that it had already disclosed a large amount of information both under the terms of the DPA and on a discretionary basis because it believed it was reasonable to do so in the circumstances. Having reviewed the information it had redacted from the HR investigation report the Trust did disclose some additional information. However it continued to withhold some of the contents of the report. It explained that under FOIA this information was exempt under section 40(2) on the basis that it was the personal data of a third party.

Scope of the case

10. The complainant originally contacted the Commissioner on 10 October 2014 to complain about the way his request for information had been handled. Following the disclosure of the additional information on the 29 October 2014, he advised the Commissioner that he still wanted access to the following information that had been withheld from the report:
 - Page 2 – notes. Appendix 4, 5 & 8
 - Page 5 - Terms of reference – 1
 - Page 4 - Background into investigation
 - Page 5 – para 3
 - Page 6 – Investigation Schedule - 17-9-12
 - Page 7 – Record keeping – paras 1, 3 & 4
 - Page 9 – Attitude & Other issues investigated
 - Page 10 – Other issues investigated
 - Page 11 – Conclusions and Recommendations.
11. On 29 November 2014 the complainant confirmed that he was only interested in the information which the Trust continued to withhold from the HR investigation report as set out above.
12. The Commissioner considers that the issue to be decided is whether the information that the Trust is continuing to withhold from the report is exempt under section 40(2).
13. When considering the complainant's right of access to the report the Trust did not look at the appendices to the report. It interpreted the request as being limited to the information contained in the main body of the report. The Commissioner does not accept the Trust's interpretation. The request captures all the appendices to the report and therefore he has included these in his consideration of application of section 40(2).

Reasons for decision

Section 40(2) – personal information

14. As far as is relevant to this request, section 40(2) of FOIA states that any information which constitutes the personal data of someone other than the person making the request, is exempt information if its disclosure to a member of the public would contravene any of the data protection principles as set out in the DPA.

15. The Trust has argued that disclosing the withheld information would breach the first data protection principle. The first principle states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless one of the conditions set out in Schedule 2 of the DPA is met.

Is the information personal data

16. The data protection principles only apply to personal data which is defined as being information that both identifies and relates to a living individual. The Commissioner has looked at the information contained in the HR Investigation Report. The Commissioner is satisfied that the focus of the report is the individual member of staff who was the subject of the investigation. The majority of the information which the Trust is continuing to withhold relates directly to that individual. It sets out their work history, the actions that an individual took in respect of the care they provided to the complainant's mother, provides their explanation of those actions, or reveals particular findings of the investigation in respect of their conduct. There is also some information which identifies other individuals involved in the investigatory process.
17. To the extent that all the information relates to the investigation of a complaint against a particular individual, it is information relating to that person. The investigation was initiated by the complainant when he wrote to the Trust naming the individual and complaining about the lack of care they provided to his mother. Therefore the identity of the individual is known to the complainant. Furthermore the Trust has already provided a substantial amount of information from the report which clearly identifies this individual. This information was provided partly in response to requests made under the DPA and partly on a discretionary basis. Although these disclosures cannot be regarded as disclosures to the world at large, it is clear that the complainant can identify the individual in question and as a result there is the potential for the identity of that individual to become known to a wider audience.
18. Even if the limited disclosure of a redacted version of the report is disregarded, the information still being withheld refers to the main data subject by initials and provides sufficient biographical information about them to make their identification a realistic possibility. The individual is actually named in full in the annexes which include notes of interviews conducted as part of the investigation. In addition the Commissioner considers that colleagues of the individual concerned would be able to identify who the report related to.
19. The Commissioner is satisfied that the withheld information is the personal data of that individual.

20. In respect of those other individuals named in the report due to their involvement in the investigation, the Commissioner is satisfied that the information clearly identifies them by name and reveals the role they played in the investigatory process. Therefore the information can be said to relate to those individuals and so constitutes their personal data. However even if this was not the case the report, taken as a whole, is the personal data of the individual who was the subject of the investigation.

Would disclosure breach the first data protection principle

21. The first principle states that the processing of personal data shall be fair and lawful and that at least one of the conditions in Schedule 2 is met. Processing includes the disclosure of information. If the disclosure fails to satisfy any of these three tests it would breach the first principle. The Commissioner's approach is to start by looking at whether the disclosure would be fair.
22. This takes account of the consequences disclosing the information would have on the individuals to whom it relates their expectations of how that information would be used, both at the time the report was produced and at the time of the request. These factors then need to be balanced against the legitimate interests in the public having access to the information.
23. The Commissioner will start by considering the potential consequences that disclosing the information would have for the individual who is the subject of the report. It is important to remember that when considering whether a disclosure under FOIA would be fair, we are looking at a disclosure to the world at large. This may seem artificial in cases such as this one, where the actual requestor of the information has already been provided with a significant amount of information because of their involvement in the events to which the report relates. That information was disclosed in accordance with the complainant's rights under the DPA and through discretionary disclosures. This information would therefore not have been made available to the other members of the public. This limited disclosure has to be disregarded when considering whether releasing the additional information would be fair.
24. Disclosing any information in response to the request would reveal that the individual in question had been the subject of an investigation following a complaint about their performance. Although the existence of a complaint does not in itself mean there was any wrongdoing, there is always the risk that the revelation could erode the professional reputation of the individual concerned. There is therefore a very strong argument that to avoid any breach of the first principle the Trust should have refused to even confirm that it held a HR investigation report into

the individual when responding to the request under FOIA. However the Commissioner appreciates why this would have been unhelpful in the this case.

25. The possible outcomes of the investigation included the commencement of formal disciplinary proceedings. It is the accepted common practice for such matters to be treated confidentially. Therefore the subject of the investigation would not expect the existence of the investigation, or the contents of the investigation report to be made public. The Commissioner notes that at the investigation meetings the confidential nature of the process was emphasised to the individual and he sees no grounds for finding these expectations would have changed in the intervening period.
26. The Commissioner recognises that issues around the performance of medical professionals can become public if the matter progresses to hearings in front of their professional bodies. However even though medical professionals are aware of the potential for this to happen it does not remove the expectation of confidentiality during the initial stages.
27. Furthermore although all medical staff have responsible roles, the individual in question does not hold a particularly senior role which would lead to them to expect greater public scrutiny of their performance.
28. When considering the legitimate interests of the public in having access to the full investigation report the Commissioner acknowledges that the public need to have confidence in the competence of the medical professionals who treat them and the procedures in place for addressing any concerns raised about their performance. However having considered the actual information the investigation appears to be have been thorough and effective in identifying any problems. The existing process provides protection for the public against any failings of medical staff. Furthermore disclosing information from the investigation could actually harm that process. Undermining the confidentiality of the process could inhibit those under investigation from discussing their performance in a full and candid manner.
29. In light of the above the Commissioner is satisfied that disclosing the withheld information would be unfair to the individual who was the subject of the investigation. The disclosure would therefore breach the first principle and so the information is exempt under section 40(2) of FOIA.
30. Although the Commissioner is satisfied that disclosing any information from the report would breach the first principle on the basis that it

would be unfair to the individual who was the subject of the investigation, he has also considered whether the disclosure would be unfair to the other individuals identified in the information that is still being withheld. The individuals concerned are simply members of staff responsible for conducting the investigatory process or otherwise involved in it. Although they may have some contact with the public, their roles are primarily internal ones dealing with HR issues. In light of this they would have no expectation of being identified through the disclosure of the report. Nor would identifying these individuals help the public understand the events to which the information relates, or increase their understanding of the processes in place to safeguard the public from poor performance. That Commissioner is satisfied that disclosing these names would breach the first principle of the DPA and therefore this information is also exempt under section 40(2) on this basis.

31. The Commissioner finds that all the information which the Trust is continuing to withhold is exempt under section 40(2). The Trust is not required to take any further action in this matter.

Right of appeal

32. 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

33. 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.
34. 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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