



IN THE FIRST-TIER TRIBUNAL **Case No. EA/2011/0108**
GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM:

Information Commissioner's Decision Notice No: FS50276199

Dated: 22nd March 2011

Appellant: Ms Rose Graham

Respondent: Information Commissioner

Heard at 45 Bedford Square on 7th November 2011

Representation: The Appellant represented herself
The Commissioner relied upon written submissions and was not represented at the oral hearing.

Date of decision: 14th November 2011

BEFORE:

Fiona Henderson (Judge)

Michael Hake

And

Dave Sivers

Subject matter: FOIA: Absolute exemption: s.40, Personal data.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal in relation to modified ground 4 and amends the Decision Notice FS50276199 dated 22nd March 2011 as follows for the reasons set out in main body of the Decision.

SUBSTITUTED DECISION NOTICE

Dated: 14th November 2011
Public authority: Imperial College Healthcare NHS Trust,
St Mary's Hospital,
Praed Street,
London W2 1NY
Name of Complainant: Ms Rose Graham

The Substituted Decision:

For the reasons set out in the Tribunal's determination, the substituted decision is that Imperial College Healthcare NHS Trust (ICHT) did not deal with the complainant's request in accordance with the requirements of Part I of the Freedom of Information Act 2000 in that the disputed information (as set out in modified ground 4) was wrongly withheld under s 40 FOIA.

Action Required:

ICHT shall provide a copy of the said information within 30 days from today.

Dated this 14th day of November 2011

Signed

Fiona Henderson (Judge)

REASONS FOR DECISION

Introduction

1. The Appellant's Mother died whilst a patient of the Imperial College Healthcare Trust (ICHT). During the course of her treatment she was transferred to Charing Cross Hospital. Above her bed a notice was placed giving the Patient's name and the Consultant's name. Letters and referrals relating to the Appellant's Mother's treatment refer to:

- “[named Consultant's] outpatient clinic” on 9th January 2009 and
- blood transfusion records from June 2009 list the named Consultant under “Consultant”. This Consultant was in fact at the time on maternity leave and never treated the Appellant's mother. Her patients were cared for by a locum Consultant in her absence. The Appellant's case is that neither her family nor her Mother were made aware of this during the initial weeks of her admission and that they made numerous fruitless attempts to contact the named Consultant during this time. She has made formal complaints to ICHT about this and other matters. The Appellant is not satisfied with the outcome of these complaints and proposes to pursue these matters through the Courts.

The request for information

2. On 12th November 2009 the Appellant asked inter alia¹:

“When did (named Consultant) go to Maternity leave?

What dates was she absent – prior to going on Maternity Leave.

What month was the baby born? How soon (date) did [named Consultant] return to work...”

¹ This was part of a series of 26 requests (including many sub requests) made between 26th August 2009 and 14th July 2010

3. ICHT responded on 15th December 2009 giving the date that the Consultant started her maternity leave and applying s 40 (personal data to the rest of this request).
4. This approach was reiterated in a letter from ICHT dated 13th October 2010, following the Appellant's initial complaint to the Commissioner.

The Complaint to the Commissioner

5. The Commissioner investigated the case and issued a Decision Notice dated 22nd March 2011 in which he found (in relation to the requests set out in para 2 above) that Personal data was correctly withheld pursuant to s40(2) FOIA.

The appeal to the Tribunal

6. The Appellant appealed on 18th April 2011. Her grounds of appeal largely consisted of a repetition of the history of the case and her Mother's treatment. The Appellant clarified that she was not interested in the private life of the Consultant and did not appeal the application of s 40(2) to the date of the birth of the baby and the Tribunal Judge struck out the grounds of appeal in relation to other aspects of the Decision Notice in a ruling dated 18th October 2011 but admitted the following:
 - Ground 4. The Commissioner was wrong to find that the date the named Doctor returned to work from maternity leave was correctly withheld under s 40(2) FOIA².
7. At the oral hearing the Appellant sought permission to call her sister in support of her case. This was despite the Tribunal having issued directions for the exchange of witness statements, and the Commissioner having made his submissions in writing. The Tribunal was satisfied that the matters that the Appellant wished to establish through her sister were already before the Tribunal by way of the document bundle, and that consequently the Appellant was not disadvantaged by there being no witness evidence, and that pursuant to the overriding objective as set out in rule 2 of

² This is referred to as the modified ground 4

the GRC Rules, it was neither necessary nor in the interests of justice that permission should be granted for this witness to be called.

8. The Tribunal considered all the written material before it and all the submissions both written and oral. The Tribunal did not receive any closed material and in particular did not consider it necessary to see the date that the Consultant returned to work in order to determine the case.

Section 40 FOIA

9. The Tribunal is satisfied that the disputed information is personal data; it falls within s1(1) Data protection Act and relates to a living individual who can be identified from it and provides biographical information about them. S40 FOIA provides that:

... (2) Any information to which a request for information relates is also exempt information if-

(a) it constitutes personal data [of which the data requestor is not the data subject], and

(b) either the first or the second condition below is satisfied.

(3) The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles,...

10. The first data protection principle provides:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

(a) at least one of the conditions in Schedule 2 is met...

11. Guidance is given as to what is meant by “fairly” in paragraph 1(1) of Part II of Schedule I:

(1) In determining for the purposes of the first principle whether personal data are processed fairly, regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed.

12. Whilst it is arguable that the data subject may not have contemplated disclosure of this information to the world at large, the Tribunal notes that:

- Hospital staff informed the Appellant of the reason for the Doctor's absence (namely that she was on maternity leave) around the beginning of June 2009,
- ICHT confirmed that the Doctor had been on maternity leave and gave the commencement date of that leave in response to the first part of the information request which is in issue.
- The Doctor stated in her email dated 23rd December 2009 that the Trust and clinical teams were fully aware that a locum had been appointed who was managing her patients; consequently the Tribunal is satisfied that the fact that the named Doctor was absent would have been apparent to the staff and her existing patients.

13. The Tribunal also observes that it would not be unusual for an organization to provide the dates of a planned absence that affected staffing in a public facing role such as leading a clinical team. It is not uncommon to see this type of information, for example, in an automatic email response. In this case the Consultant confirmed Trust staff had been advised of arrangements during her absence and, in her e-mail confirming this³, does not indicate any restriction on this information being shared appropriately with patients. Additionally the Tribunal notes that the ICHT were prepared to give the date that the locum Consultant started working at the Trust and considers that this information is of a similar type. Although this information is personal data it is predominantly work related information rather than private. The nature of the absence (namely that it is maternity leave rather than e.g. a sabbatical)

³ Dated 23rd December 2009

is what gives it a private quality, however, that information has already been given out by the hospital and would not be revealed merely by providing the date of return to work. Nor is it suggested that the date itself would provide any information relating to the health or age of the baby or the named Consultant's health. It is accepted by the Commissioner that this is not sensitive personal data⁴ and the Tribunal observes that the date of return to work from maternity leave is rooted in a combination of statutory entitlement and parental choice.

14. The Tribunal is satisfied that the Consultant has a public facing role and it would therefore be apparent to her patients, the staff and visitors when the Consultant had returned from Maternity Leave. The Commissioner argues that whilst this information may be apparent to those in contact with her at the time that she returns, that the Appellant's request is different as she is asking for the information retrospectively. The Tribunal considers this argument to be misconceived on the facts of this case since the Appellant's Mother was a patient during the absence that is being asked about and the named Consultant became involved in commenting upon the complaint once she had returned.

15. The first data protection principle requires one of the conditions in Schedule 2 DPA to be met before disclosure can be made. Condition 6 provides;

(1)The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

16. The Appellant has raised reasons why she says that the data is necessary for the purposes of the legitimate interests pursued by her and the wider public.

17. From the Appellant's letter to the Parliamentary and Health Service Ombudsman dated 5th July 2011 it is apparent that up until shortly before the meeting on 8th June 2009 she and her family had not been told that the named Consultant was absent:

⁴ In his Decision Notice, the Commissioner found that the original group of requests were sensitive personal data but that is in the context that the date of birth of the baby was being asked for.

- There is a record on 26th May 2009 stating that a nurse would arrange a meeting with the named Consultant,
- The ward manager is documented on 28th May 2009 as arranging for there to be a meeting with the named Consultant.
- The Occupational Therapist recorded that she advised the Appellant to speak to the named Consultant on 29th May 2009.
- The Appellant and her family were originally told that the named Consultant would be attending the meeting on 8th June 2009.

18. In her email dated 23rd December 2009 the named Consultant states:

“I was absent from the trust at the time of diagnosis and treatment of Ms Graham”.
This is in conflict with the information that was apparently being given to the Appellant at the time. The Tribunal is satisfied that the Appellant has a legitimate interest in being able to reconcile apparently inconsistent accounts that have been given to her.

19. Additionally the Appellant argues that there is a greater public interest argument in that it is wrong to put the name of a long term absent consultant upon the records of any patient as it leads to confusion and a lack of accountability within the treating team. The dates of the absence are necessary to enable her to make her point specifically and clearly and also to establish the length of time that such an arrangement involves.

20. The Commissioner argues that disclosure of the information would be unwarranted and would prejudice the rights and freedoms of the named Consultant. He argues that from the history and context of this matter, there was a real risk of distress and damage being caused by this disclosure. In their letter dated 14th October 2011 ICHT argued that:

“The Trust can see no use for this information that relates to Mrs Graham’s enquiry except to contact and harass [the named Consultant]”.

The Tribunal notes that this is in the context that the original request included a request for the date of birth of the baby and that the request that is being considered here (the date of the return to work) is considerably narrower.

21. From the terms of the request it is apparent that the named Consultant had returned to work at the date of the request. The Tribunal is not satisfied that knowledge of the exact date of the return to work (when it is already known that the Consultant has returned) can be used to harass or distress, and the Commissioner does not elaborate on how he believes that this would occur.

Conclusion

22. For the reasons set out above, the Tribunal is satisfied that disclosure of this information would not be unfair and would not breach the data protection principles. The Tribunal allows the appeal in relation to the modified ground 4 and finds that the disputed information was wrongly withheld under s 40 FOIA.

Dated this 14th day of November 2011

Fiona Henderson

Judge