



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2013/0006

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No: FS50454819
Dated: 11 December 2012**

Appellant: Haluk Kozan

Respondent: The Information Commissioner

Heard on the papers: Bristol Civil Justice Centre

Date of Hearing: 26 April 2013

**Before
Christopher Hughes
Judge**

and

**Jacqueline Blake and Suzanne Cosgrave
Tribunal Members**

Date of Decision: 1 May 2013

Subject matter:

Freedom of Information Act 2000

Data Protection Act 1998

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 11 December 2012 and dismisses the appeal.

Dated this 1st day of May 2013

Judge C Hughes

[Signed on original]

REASONS FOR DECISION

Introduction

1. Mr Kozan was treated at Epsom and St Helier University Hospitals NHS Trust and was dissatisfied with his treatment. On 29 January 2012 he wrote to the Trust making a number of requests for information. Much information has been supplied and the only matter before this tribunal is a request he made for details of any complaint against a named member of staff.
2. The Trust informed him on 8 March 2012 that it considered that any such disclosure would contravene the data protection principles and therefore the request was refused under the exemption in section 40 of FOIA. At Mr Kozan's request the trust reviewed its decision and on 20 June 2012 confirmed its refusal.
3. On 25 June 2012 Mr Kozan complained to the Commissioner about the refusal.
4. The Commissioner in his decision notice concluded that the information requested was personal data and considered that the trust did not have a duty to confirm whether or not it held any such data. It considered Mr Kozan's argument that it was in the public interest to know that NHS clinicians are fit to practise but considered that the public interest in ensuring their fitness to practise was protected by the Trust's complaints procedure. In the light of the individual's expectation that personal data should be kept confidential he rejected Mr Kozan's complaint that the complaints history should be disclosed.

The appeal to the Tribunal

5. In his appeal Mr Kozan has four points:-
 - that the Commissioner failed to fully explain his reasoning with respect to the Trust's reliance on S40(2) FOIA
 - if this clinician has made mistakes in the past the information should be made public

- the medical profession should be open to public scrutiny and protection of a clinician's personal data is less important than the health and welfare of patients
 - the situation is unfair and suggests there has been a cover-up.
6. In support of his appeal he submitted numerous documents related to his complaint to the Trust. He remains dissatisfied with how his complaint has been handled by the Trust.

Legal analysis

7. The starting point in this case is to consider the statutory background against which Mr Kozan is seeking information about his clinician. The basic right to information is set out in S1 FOIA. This provides:-

“(1)Any person making a request for information to a public authority is entitled—

(a)to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b)if that is the case, to have that information communicated to him.

(2)Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

.....

(6)In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

8. Mr Kozan asked for information and expected to receive it, instead, the Commissioner has said that there is no duty on the public body to confirm whether or not it holds the information. The reason for this follows from further provisions of FOIA. Section 2 provides part of the answer:-

2 (1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either—

(a)the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, section 1(1)(a) does not apply.

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—

.....

(f) in section 40—

(i) subsection (1), and

(ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,”

9. The Trust, in replying to Mr Kozan, identified the issue of personal data as being the reason the request should not be granted. S40 FOIA deals with personal data and provides (so far as is relevant):-

“40 Personal information.

(1) 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.

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

(a) it constitutes personal data which do not fall within subsection (1), 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, or

.....

(5)The duty to confirm or deny—

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either—

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded,”

10. S40 can provide an absolute exemption under FOIA to personal data. The effect of this exemption is that the Trust cannot confirm or deny whether it holds any of the requested data (complaints against the clinician) if the disclosure would breach data protection principles.
11. The question therefore is whether the disclosure would contravene any of the data protection principles. The key relevant principle is the first – that data processing should be fair and lawful. The Commissioner considered that the complaints history of clinicians is sensitive information and clinicians would expect that it would not be disclosed. It would be unfair to disclose it as the disclosure of the existence of a complaints record would be out of context and would cause distress to the individual concerned. A further data protection difficulty would be the risk of revealing personal data about other patients. It could only be justified if there were a pressing social need to disclose it.
12. In this case Mr Kozan has argued that he was not satisfied with the treatment he had received. However knowledge of the complaints history of the clinician does not help him with any redress he may seek in vindication of his private rights. He has pursued his complaint against the treatment he has received to the Trust. It is open to him to pursue it with the Ombudsman or through litigation. If he has concerns about the safety of the clinician as a matter of public interest then he can pursue the issue either

through one of the Regulators concerned with the services provided by NHS bodies (the Care Quality Commission and Monitor) or with the clinician's own Regulator – the General Medical Council. Knowledge of whether or not complaints have been made against the clinician will not help him in pursuing his individual redress, nor will the Regulators need him to provide such information. The Commissioner therefore correctly concluded that the disclosure would be unlawful.

13. In considering the grounds of appeal it is therefore clear that:-

- the Commissioner was correct not to explore a statutory provision (S.40) which the Trust raised, but which he did not rely on in coming to his decision. His decision was that there was no duty to confirm or deny the existence of a complaints history, since in coming to that conclusion there were no further matters to consider; there was no statutory right to disclosure to be explored;
- In consideration of the Schedule 2 of The Data Protection Act 1998, which are Conditions relevant for... processing of any personal data; whilst Mr Kozan makes a strong case of his personal interest in having this information it is not possible to determine that any one of the conditions in Schedule 2 would be met and hence the data would not be processed fairly and lawfully. Mr Kozan's case is there is need for scrutiny of alleged past mistakes and there is an unfairness to Mr Kozan however this does not defeat the data protection exemption; in any event the implications of all these issues could be addressed without confirming to the world whether or not there was a complaints history of this clinician.

Conclusion and remedy

14. The Tribunal was therefore satisfied that the Commissioner's decision notice was correct in law.

15. Our decision is unanimous

Judge Christopher Hughes

[Signed on original]

1 May 2013