

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 14 January 2008

Public Authority: Mersey Care NHS Trust
Address: Parkbourn Liverpool
Merseyside
L31 1HW

Summary

The complainant requested copies of five critical incident Reports from the Trust. Each of the reports referred to is the final report of an internal inquiry carried out by the Trust following a murder involving one of its patients. The public authority declined to provide the information on the basis of the exemptions contained in sections 40(3)(a), 41 and 36(2)(c) of the Freedom of Information Act 2000 (FOIA). After considering the case the Commissioner upheld the Public Authority's decision to withhold the information under section 40(3)(a) of the FOIA. The Commissioner has therefore not considered the other exemptions cited by the public authority. The Commissioner does not require the public authority to take any further steps in relation to the complainant's request.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant in a letter dated 25 July 2006 made a request in accordance with section 1 of the FOIA for;

'five of the reports, described on your table as:

1. 19 Feb 2004 – Class A – Murder
 2. 10 Mar 2004 – Class A – Murder
 3. 2 May 2004 – Class A – Murder
 4. 30 May 2004 – Class A – Murder
 5. 20 Dec 2005 – Class A - Murder
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3. The public authority issued a refusal notice to the complainant in a letter dated 4 August 2007 relying on the exemptions contained in sections 40(3)(a), 41 and 36(2)(c).
 4. The complainant asked the public authority to review its decision not to disclose the information in a letter dated 04 August 2007.
 5. The public authority concluded its internal review and responded to the complainant in a letter dated 11 August 2007. It upheld the original decision not to disclose the information on the basis of the exemptions contained in sections 40(3)(a), 41 and 36(2)(c).

The Investigation

Scope of the case

6. On 15 August 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
7. In relation to section 36 he is of the opinion that the '*balance of public interest and the effective conduct of public affairs lies strongly in favour of informing the public as whether there are any failings in the Trust's security arrangements, rather than keeping this information secret.*
8. Regarding section 40 he argues that '*these are reports on the Trust and whether it adequately protects the security of the public and of patients in its care.*' He therefore believes that the reports cannot be characterised as '*personal information*'. He however adds that he is willing to accept the disclosure of redacted versions if the Commissioner rules that section 40 is engaged.

Chronology

9. The Commissioner contacted the complainant on 20 September 2007 outlining the scope of the investigation and inviting him to identify any other matters that he feels should also be addressed.

10. The complainant confirmed in a telephone conversation on 25 September 2007 that he is happy with the scope of the Commissioner's investigation.
11. The Commissioner contacted the public authority on 25 September 2007. The Commissioner asked the public authority to provide him with copies of the requested information including full and detailed explanations as to why each of the exemptions cited are engaged.
12. The public authority responded on 19 October 2007. In its response the public authority provided him with the information requested as well as the reasoning behind its reliance on the exemptions cited.
13. The public authority also provided the Commissioner with redacted versions of two of the reports and a copy of its '*Policy & Procedure for the Reporting, Management and Review of Adverse Incidents (including serious untoward Incidents and near misses)*'
14. With regard the exemption contained in section 40, the public authority informed the Commissioner that processing the information contained in the review beyond the contribution to the internal inquiry would not be fair to those individuals and beyond what the public authority led them to believe their involvement would be. In other words, disclosure would contravene the first data protection principle.
15. The public authority also added that obtaining the consent of the parties involved would be '*inappropriate in most cases and highly problematic in re-establishing contact with many of the contributors*'
16. The public authority also informed the Commissioner that as part of the redaction process it invited its legal manager and complaints investigator both of whom had not been involved in the reviews to comment on the redacted reports. They both concluded '*that this redacted information combining with some other information, would lead to the (identification) of those involved.*'
17. Pursuant to a clarification request by the Commissioner, the public authority indicated that the dates described in the table referred to by the complainant are available on the public authority's electronic database (DATIX) which has many date fields. This table was provided to the complainant in response to an earlier information request. The table detailed the type of incident and final incident date.
18. According to the public authority the final incident dates referred to in the table are not the dates of deaths. However, they are definitely the reports in relation to the five incidents which are the focus of the complainant's information request.

Analysis

Exemption

19. The Commissioner first considered the applicability or otherwise of section 40(2) and in effect section 40(3)(a) to the reports.
20. The combined effect of section of 40(2) and 40(3)(a) is that information is exempt from disclosure if it constitutes personal data of which the applicant is not the data subject and its disclosure would contravene any of the data protection principles or a section 10 notice under the Data Protection Act 1998 (DPA).
21. A full text of sections 40(2) and 40(3)(a) can be found in the Legal Annex at the end of this Notice.
22. In line with the provisions of sections 40(2) and 40(3)(a), the Commissioner has gone on to consider whether the information is personal data as stipulated in the DPA. Section 1(1) of the DPA defines personal data 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 intentions of the data controller or any other person in respect of the individual;'
23. Having considered the reports in question the Commissioner is convinced that they are personal data within the definition of the DPA for the following reasons;
24. The reports in question relate to identifiable individuals because they could either be easily processed to learn, record, or decide something about individuals or same could be possible as an incidental consequence of the processing.
25. The Commissioner also considers that the small and specific numbers of incidents involved also narrows the range within which data contained in the reports could be linked to an individual(s) to provide particular information about that individual(s).

26. The Commissioner has gone on to consider whether disclosure of the information would contravene the first data protection principle as alleged by the public authority.
27. The thrust of the first data protection principle is that personal data should be processed fairly and lawfully.
28. In reaching a decision as to whether disclosure of the information would contravene the first data protection principle the Commissioner has considered the following:

How was the Information obtained?

29. The information contained in the reports were mainly obtained from General Practitioners and Carers involved in the medical care of the patients involved in critical incidents. Medical information such as this would be subject to a Doctor/Patient confidentiality and are generally non-disclosable. Any recommendations, or criticisms contained in the reports were made on the basis of the medical related data obtained from these sources.

Likely Expectations of the Data Subjects

30. The Commissioner also notes that an important point to consider is whether any of the contributors to the report expected the information they provided would be made publicly available. As noted above the contribution made by the medical personnel involved with the patients and their families would have been made in the knowledge that they are bound by patient confidentiality. Indeed, internal reviews into critical incidents are classed as confidential in the public authority's 'Policy and Procedure for the Reporting, Management and Review of Adverse Incidents.' (available in Appendix 19 page 71 of the policy). It therefore follows that it is highly unlikely that the patients or indeed members of their families would expect that such information as well any further information provided by them as part of the review process would be made publicly available.
31. The Commissioner has therefore concluded from the above points that disclosing the information would contravene the fairness element of the first data protection principle.
32. The Commissioner also believes that the disclosure of this information would be a breach of confidence and hence unlawful.
33. The Commissioner is therefore satisfied that section 40(2) and by extension section 40(3)(a) is engaged in this instance.
34. The Commissioner also considered whether the reports without the conclusions and recommendations could be sufficiently redacted in order to disclose them without breaching section 40(2).

35. The Commissioner acknowledges that information should not be withheld simply to spare officials embarrassment over poor administrative decisions.
36. However the Commissioner notes that each report is a compilation of a history of events centred on details of the patients and their interaction with a number of other individuals including their GPs, carers, and family members.
37. These events coupled with the medical status of these patients, medical opinions about them as well as medical treatment are intrinsically linked to the information contained in the reports.
38. The Commissioner also notes the nature of interaction between the patients and other individuals mentioned in the reports means the contents of the reports would include personal data about these other individuals as well.
39. Based on the above points the Commissioner has made the following conclusions in relation to redacting the reports in question.
40. The reports in question are very much linked with the personal data of the patients and to some extent those of their families that redacted copies would in effect render them meaningless.
41. Whilst the Commissioner's guidance in relation to section 40 encourages the disclosure of personal information relating to senior officials acting within their professional capacity, the nature of interaction between them and the patients involved means there is no sensible way of separating the personal information about each one individually.
42. The Commissioner also considered whether the conclusions and recommendations contained in the reports could be redacted in order to be disclosed without breaching section 40(2) of the Act.
43. In considering the possibility of redacting the conclusions and recommendations the Commissioner took into account the complainant's point that the inquiries were undertaken so that wider lessons could be learned.
44. However the Commissioner considers that the disclosure of redacted versions of the conclusions and recommendations in each report would on their own lose their focus and inevitably renders them meaningless without additional information from the data controller.
45. In view of the fact that the Commissioner is satisfied that the information contained in the reports is personal data and that

disclosure would breach the first data protection principle, the section 40 exemption is engaged. As this is an absolute exemption it is not subject to the public interest test.

46. As the Commissioner has concluded that the section 40 exemption has been correctly applied he has not gone on to consider the application of section 36 or section 41.

The Decision

47. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act

Right of Appeal

48. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 14th day of January 2008

Signed

**Jane Durkin
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 40(2) provides that –

“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.”

Section 40(3) provides that –

“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
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”