

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 March 2009

Public Authority: Epsom & St Helier University Hospital NHS Trust
Address: St Helier Hospital
Wrythe Lane
Carshlton
Surrey SM5 1AA

Summary

The complainant requested information relating to the departure and appointment of certain members of staff. The public authority declined to disclose the requested information, initially citing the exemptions at section 40(2) and section 41. Subsequently, the public authority withdrew section 41 and applied section 36(2)(b) or (c) instead. The Commissioner found that the public authority had appropriately applied section 40(2) and that it complied with section 1(1)(a) of the Act. However, he found the Trust in breach of sections 10(1) and 17(1)(a), (b) and (c) as it did not respond to the complainant within 20 working days or explain which exemption it was relying upon and why.

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. On 1 February 2007 the complainant made the following request:

'I would be grateful if you could supply me with documentation relating in any way to the following subjects:

- *The departure from post of Epsom and St Helier Hospital Trust Chief Executive Lorraine Clifton effective from 31st December 2006*
- *The appointment of Graham Smith as interim Chief Executive of Epsom and St Helier Hospital Trust , effective from 4th January 2007*

- *The planned departure from post of Epsom and St Helier Hospital Trust Chairman Michael Doherty announced on 11th January 2007*

Please include copies of material which you hold in the form of paper and electronic record including emails.'

3. On 30 April 2007 Epsom and St Helier University Hospitals NHS Trust (the "Trust") contacted the complainant explaining that it had already provided him with information related to the first point of his request on 25 January 2007 in response to an earlier request for information. It then explained that in relation to his second point, the appointment was made following an advertisement and interview process which was overseen by a panel. The Trust also explained that any records relating to the appointment process were confidential and release would contravene the Data Protection Act 1998 (DPA) but it did not specify which exemption it was applying.
4. With regard to the third point, the Trust explained that the resignation of Mr Doherty was a personal decision and as a statement had been made about this, it was unsure what else the complainant wanted.
5. The Trust also explained that for it to search for all records that related to the request would take a vast amount of time. It stated that it did not have the facility to search all email accounts in one go and that a search would have to be done on individual accounts as well as electronic and manual record systems, involving a variety of search terms. It would also have to ensure that nobody else's confidentiality had been breached. The Trust pointed out that there was already information in the public domain about the three issues and it would be publishing more information in its September 2007 Annual Report.
6. As the Trust was uncertain what other information the complainant wanted, it asked him to clarify this point.
7. On 20 June 2007 the complainant wrote to the Trust complaining that:
 - he was disappointed that it had not supplied all the requested documentation and in particular a letter dated 7 January 2007 from Mr Doherty
 - the Trust had not disclosed any further correspondence between Mr Doherty and the Trust
 - he knew that the letter of 7 January 2007 did exist and that it appeared that the Trust had withheld it
 - he was also requesting an internal review.
8. On 25 July 2007 the Trust wrote to the complainant apologising for not making it clear that the letter dated 7 January 2007 did exist. The Trust also explained that it would be looking at the request again and seeing what it could and could not release.

9. On 16 August 2007 the Trust wrote to the complainant confirming that the letter dated 7 January 2007 was the only piece of correspondence it held in relation to his points in his letter dated 20 June 2007. The Trust confirmed that the letter had been written by its then Chairman Mr Doherty about Ms Clifton who had left. It also explained that it was applying sections 40(2) and 41 to withhold the information.
10. On 26 September 2007 the complainant wrote to the Trust again complaining about the way in which it had handled his request for information and requesting an internal review.
11. On 1 November 2007 the Trust wrote to the complainant confirming that an internal review had taken place. It upheld the original decision not to disclose the requested information, citing section 40(2). It also explained that it did not feel that the application of section 41 was appropriate, instead citing the section 36(2)(b) or (c) .

The Investigation

Scope of the case

12. On 4 January 2007 the complainant made an initial request for information about Ms Clifton. The Trust disclosed some information but withheld other information citing the section 40(2) exemption stating that disclosure of certain information would breach the DPA. As the complainant has not complained to the Commissioner about the Trust's handling of this request has not been will not be considered in this notice.
13. On the 26 September 2007 the complainant contacted the Commissioner to complain about the way his request for information of 1 February 2007 had been handled. He stated that at issue in particular was a letter written by Mr Doherty to the then Secretary of State for Health regarding Ms Clifton's departure. The complainant specifically asked the Commissioner to consider the following points:
 - The Trust's refusal to disclose the requested information.
 - The Trust initial failure to admit the existence of a letter dated 7 January 2007 written by the ex-chairman Mr Doherty to the then Secretary of State for Health about Ms Clifton's departure.
 - The Trust had inappropriately applied exemptions, preventing the disclosure of this letter.
14. Although the complainant had requested an internal review, it had not been carried out by the time he complained to the Commissioner.
15. Following receipt of the Trust's internal review outcome of 1 November 2007, on 6 November 2007, the complainant complained to the Commissioner again about the way in which the Trust had handled his request for information. He reiterated that at issue in particular was the letter from the then Chairman Mr Doherty to the

then Secretary of State for Health Patricia Hewitt, about Ms Clifton. The Commissioner has therefore confined his investigation to whether the Trust was correct to withhold this information or not.

Chronology

16. On 24 July 2008 the Commissioner contacted the Trust requesting a copy of the exempt information and an explanation of why it had applied sections 40(2) and 36(2).
17. On 2 September 2008 the Trust provided a copy of the exempt information together with an explanation as to why it had applied sections 40(2) and 36(2).
18. On 8 September 2008 the Commissioner contacted the Trust to clarify whether there had been an investigation in relation to the first point of the complainant's request.
19. The Trust queried why the Commissioner wanted this information as it felt it was unfair of the Commissioner to investigate any settlement that might have been reached. The Commissioner explained that he needed this information to help decide whether the first data protection principle had been applied correctly.
20. On 20 October 2008 the Chairman of the Trust confirmed that a compromise agreement had been reached. He also confirmed that the process adopted by the Trust was consistent with both NHS policy and Trust procedure.
21. On 18 November 2008 the Commissioner contacted the Trust to ascertain what information had been released into the public domain about Ms Clifton's departure.
22. On 18 December 2008 the Trust responded enclosing copies of the information that was in the public domain at the time of the request and also referred to some Board papers. The Commissioner asked for a copy of the Board papers that referred to Ms Clifton and asked for confirmation as to whether these papers were in the public domain.
23. On 19 December 2008 the Trust provided a copy of the Board papers and confirmed they were in the public domain.

Findings of fact

24. Ms Clifton had been the Trust Chief Executive of the Trust and stepped down from this post on 31 December 2006 after reaching a compromise agreement with the Trust.
25. Mr Doherty was the Chairman of the Trust when he wrote the letter dated 7 January 2007 to the then Secretary of State for Health (Patricia Hewitt) regarding the departure of Ms Clifton.

26. The Trust confirmed to the Commissioner that the compromise settlement reached involved lawyers on both sides and that the process adopted by the Trust was consistent with NHS Policy and Trust procedures.

Analysis

Procedural Matters

Section 1(1)(a)

27. Section 1(1)(a) provides that a public authority must inform an applicant in writing whether it holds the requested information.
28. In this case, on 16 August 2007 the Trust did confirm that it holds the letter of 7 January 2007 over six months after it received the request on 1 February 2007. However, as this confirmation was provided prior to the outcome of the internal review of 1 November 2007 the Commissioner has not found the Trust in breach of section 1(1)(a) of the Act.

Section 10(1)

29. Section 10(1) of the Act provides that a public authority must comply with section 1(1) within twenty working days of receiving a request for information. In its refusal notice of 30 April 2007 the Trust did not confirm what information it held. The complainant then requested an internal review and in response to this the Trust explained that it did in fact hold a letter dated 7 January 2007 from Mr Doherty to Patricia Hewitt about the departure of Ms Clifton. It apologised for not confirming this initially.
30. As set out above the request for information was made on 1 February 2007. The Trust confirmed it held the relevant letter on 16 August 2007, over six months after it received the request. Accordingly the Commissioner finds that the Trust failed to comply with its duty under section 10(1) of the Act as it did not confirm whether it held the requested information within the twenty working day limit. In citing the Trust in breach of its obligations under section 10(1) the Commissioner also wishes to highlight his considerable concern over the excessive delay which occurred between the Trust's receipt of the request and its subsequent confirmation.

Section 17(1)

31. Section 17(1) of the Act provides that a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt; and that where a request for information is refused upon the basis of an exemption the public authority must explain what exemption(s) have been relied upon.

32. The Trust did not respond to the complainant within the twenty working day limit and did not specify which exemption(s) it was relying upon until the internal review. Accordingly the Commissioner finds that the Trust failed to comply with its obligations under section 171)(a), (b) and (c) of the Act.

Exemption

Section 40(2)

33. Section 40(2) provides an exemption for information which is the personal data of a third party, where disclosure would breach any of the data protection principles contained in the DPA. In order to rely upon the exemption provided by section 40(2) the requested information must constitute personal data as defined by the DPA section 1(1) which 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.

34. The Trust argued that the requested information constitutes the personal data of Ms Clifton and the other individuals referred to in the letter.
35. The Commissioner has reviewed the requested information and is satisfied that it is the personal information of Ms Clifton who is the subject of the letter. He is also satisfied that some of the information is the personal information of others who gave their opinions.

The first data protection principle

36. In a letter to the Commissioner the Trust argued that disclosure of the requested information would breach the first data protection principle. There are two parts to the first data protection principle:

- 1. Personal data must be processed fairly and lawfully, and
- 2. Personal data shall not be processed unless one of the conditions in the DPA Schedule 2 is met.

37. The Trust argued that the processing of the requested information would not be fair to the individuals discussed in the requested information. It also explained that as the information was personal data, disclosure would be a breach of the data protection principles.

38. The Commissioner agrees that the relevant data protection principle is the first principle which requires any processing to be fair and lawful.

39. The Commissioner has considered the withheld information and Ms Clifton's reasonable expectation that this information would not be disclosed.
40. The Commissioner recognises that there is an expectation that information about senior employees who have reached compromise settlements and leave employment by mutual agreement, should be treated as confidential.
41. The Commissioner's Awareness Guidance (AG1) deals with personal data and makes it clear that the seniority of the official should be taken into account when personal data is requested under the Act: 'The more senior a person is the less likely it will be that disclosing information about their public duties will be unwarranted or unfair' (pg 8).
42. Ms Clifton was the Chief Executive of the Trust and therefore had a high profile; there was also information in the public domain about her departure from the Trust. Although people at this senior level do have information about them put into the public domain, information of the nature requested is not usually publicly available. Having looked at the information that was in the public domain at the time, the Commissioner is satisfied that in this case there was no information about why Ms Clifton left or what settlement had been reached.
43. The Commissioner notes the Information Tribunal's (the Tribunal) decision in *the House of Commons v The Information Commissioner and Norman Baker MP (EA2006/0015 and 0016)* which recognised that when considering the disclosure of personal data, a distinction can be drawn between information relating to public and private lives. The Tribunal found that when assessing fair processing the interests of the data subject are no longer paramount considerations, so far as 'public officials are concerned where the purposes for which the data are processed arise through the performance of a public function'.
44. The Tribunal also said that the interest of the data subject are still important, but where those individuals: 'carry out public functions, hold elective office or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their private lives' (paragraph 78).
45. Although Ms Clifton was in a senior position in the Trust and the information relates to her public life, the Commissioner is satisfied that she would have had a reasonable expectation that the requested information would not be disclosed.
46. The Commissioner has reviewed the requested information in order to determine whether its disclosure would be unfair to Ms Clifton. He recognises that even amongst senior members of staff there would still be an expectation of privacy between the ex-employee and employer regarding any correspondence about the ex-employee's employment.
47. The Commissioner has not found any evidence to suggest that Ms Clifton proactively sought to put details of her departure from the Trust into the public

domain. If she had done this it may have been possible to argue that she could not have had a reasonable expectation that the information would remain private.

48. The Commissioner is also satisfied that the other people who are referred to and quoted in the letter would have a reasonable expectation that the information would not be disclosed to the general public. Disclosure of their personal data would, in the Commissioner's view, be unfair to them.
49. When looking at fairness the Commissioner also considered paragraph 6 in Schedule 2 of the DPA, which is one of the conditions for processing personal data. This is satisfied where:

‘The processing is necessary for the purposes of legitimate interests by the data controller or by a 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’.
50. The Tribunal looked at paragraph 6 Schedule 2 in its decision in *House of Commons v The Information Commissioner and Norman Baker MP (EA2006/0015 and 0016)* and suggested that the ‘application of paragraph 6 Schedule 2 of the DPA involves a balance between the competing interests broadly comparable, although not identical, to the balance that applies under the public interest test for qualified exemptions’ (paragraph 90). In order to satisfy the sixth condition (and the second part of the first data protection principle) the arguments in favour of disclosure must outweigh those in favour of preserving privacy and the interests of the data subject.
51. The Commissioner accepts that there is a legitimate public interest in knowing the concerns Mr Doherty had about the treatment of Ms Clifton by the Trust. However the requested information pertains to Mr Doherty's own concerns and views about what happened, including quotes from other members of staff.
52. The Commissioner recognises that there may be circumstances when it would be legitimate to disclose information relating to the departure of a senior member of staff.
53. However in this particular case the Commissioner does not consider that the legitimate interests of the public in accessing the requested information are sufficient to outweigh Ms Clifton's right to privacy; particularly given the substantial level of detriment if the information was disclosed and the significant invasion of her privacy which would result if the information was disclosed. The Commissioner is also minded that disclosure may have a harmful effect on Ms Clifton's future employment prospects. The Commissioner therefore accepts that disclosure of this information would contravene the requirements of the first data protection principle constituting an invasion of Ms Clifton's privacy.
54. The Commissioner also noted the Tribunal's decision in *Waugh v The Information Commissioner and Doncaster College (EA/2008/0038)*. This case dealt with the departure of senior staff where a compromise agreement had been reached. In

this case the College carried out an investigation into the behaviour of its then principal. The Tribunal took into account the fact that the ex-principal had not actively put details of his departure into the public domain. It also noted the decision in *House of Commons v The Information Commissioner and Norman Baker MP (EA/2006/0015)*, which recognised that a “distinction can be drawn between information relating to public and private lives when considering the disclosure of personal data relating to public officials.”

55. Further, the Tribunal noted and applied the comments by Lord Hope in *Common Services Agency v Scottish Information Commissioner [2008] 1 WLR 1550 (paragraph 7)* which concerned the equivalent exemption in the Freedom of Information (Scotland) Act 2002 (FOISA): “In my opinion there is no presumption in favour of the release of personal data under the general obligation that FOISA lays down. The references which that Act makes [to] the provisions of DPA 1998 must be understood in the light of the legislative purposes of that Act, which was to implement Council Directive 95/46/EC. The guiding principle is the protection of the fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data ...”.

The Decision

56. The Commissioner’s decision is that the Trust correctly applied section 40(2) of the Act by virtue of section 40(3)(a)(i).

The Commissioner has also concluded that the Trust complied with its obligations under s1(1)(a) of the Act.

57. However, the Commissioner has also decided that the Trust did not comply with its obligations under sections 10(1) and 17(1)(a),(b) and (c) of the Act.

Steps Required

58. The Commissioner requires no steps to be taken.

Right of Appeal

59. 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.
Website: www.informationtribunal.gov.uk

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.

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 16th day of March 2009

Signed

**Nicole Duncan
Head of FOI Complaints**

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

Legal Annex

Section 1

Section 1 (1) provides that-

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.

Section 10

Section 10(1) provides that –

Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

Section 10(2) provides that –

Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.

Section 10(3) provides that –

If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

Section 10(4) provides that –

The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.

Section 10(5) provides that –

Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.

Section 10(6) provides that –
In this section –
“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

Section 17

Section 17(1) provides that -

A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

Section 17(2) states –

Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate

of the date by which the authority expects that such a decision will have been reached.

Section 17(3) provides that -

A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, 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 authority holds the information, or

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

Section 17(4) provides that -

A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

Section 17(6) provides that –

Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

Section 17(7) provides that –

A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.

Section 40

Section 40(1) provides that –

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.

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.

Section 40(4) provides that –

The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

Section 40(5) provides that –

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) he 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, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

Section 40(6) provides that –

In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

Section 40(7) provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.