

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 28 June 2010

Public Authority: Knowsley PCT
Address: PO Box 23
Nutgrove Villa
Westmorland Road
Huyton
Knowsley
Merseyside
L36 6GA

Summary

The complainant made a request under the Freedom of Information Act 2000 (the "Act") to Knowsley PCT (the "PCT") for details of all the doctors who have been investigated by Knowsley PCT or referred to the National Clinical Assessment Service (the 'NCAS') or the General Medical Council (the 'GMC'). The PCT refused to provide the requested information to the complainant as it stated that it was exempt under section 40(2) of the Act. The PCT did however provide some information to the complainant during the course of the Commissioner's investigation. The Commissioner considers that the PCT correctly applied section 40(2) to the remaining withheld information. He has also found breaches of section 1(1) (b) and section 10(1) of the Act.

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 12 September 2008 the complainant made a number of requests to the PCT. The outstanding request which is the subject of this decision notice was point 10 of the requests made and was for, "Details of all the doctors who have been investigated by Knowsley PCT or referred to NCAS or GMC".
3. On 13 October 2008 the PCT responded to the requests for information. In relation to the request which is the subject of this decision notice, it applied the section 40 exemption. It explained that under the Data Protection Act 1998 it is required to process personally identifiable information lawfully; therefore it suggested that disclosure was not permitted under the Act.
4. On 17 November 2008 the complainant asked the PCT to conduct an internal review.
5. On 1 July 2009 the PCT wrote to the complainant with the result of the internal review it had carried out. It explained that its response had been delayed as it had no record of receiving the complainant's letter of 17 November 2008 and only became aware of it through the Information Commissioner's Office in June 2009. The PCT explained that it was satisfied that its refusal to provide details of the GPs concerned was consistent with the exemption contained at section 40(2) and 40(3)(a)(i) of the Act. It explained that disclosure of the details of the GPs concerned would breach the first data protection principle whereby "personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 [of the DPA] is met". It explained that Schedule 2 of the DPA sets out a number of conditions of which it believed the sixth condition was most relevant. The sixth condition sets out the following, "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." In considering the applicability of this condition, it suggested that the potential prejudice caused to the GPs concerned by release of the requested information would outweigh any interest the

complainant may have in knowing the identities of the GPs concerned and the specific details of particular investigations.

The Investigation

Scope of the case

6. On 23 February 2009 the complainant wrote to the Commissioner as he was dissatisfied with the response he had received in relation to the requests he had made on 12 September 2008 and had not received a response to his request for an internal review. On 1 June 2009 the Commissioner wrote to the PCT and asked it to conduct an internal review as requested by the complainant on 17 November 2008. As stated above the PCT wrote to the complainant with the result of the internal review on 1 July 2009. On 16 July 2009 the complainant wrote to the ICO and confirmed that he was dissatisfied with the result of the internal review.
7. After considering the complaint, the Commissioner wrote to the complainant and explained that having reviewed the PCT's internal review response it would seem that the only outstanding issue for the Commissioner to consider under the Act was the information requested at point 10 of the request made on 12 September 2008. This information had been withheld under section 40(2).
8. On 6 October 2008 the complainant replied to the Commissioner and did not dispute the extent of the outstanding issue in this case. Further correspondence occurred between the complainant and the Commissioner cumulating in a letter from the Commissioner dated 3 December 2009 in which it was confirmed that the investigation would focus solely upon request 10 made on 12 September 2008.
9. On 26 March 2010 the Commissioner wrote to the complainant to ask him to clarify what he had meant when he had requested 'details' of all the doctors who had been investigated by the PCT or referred to the NCAS or the GMC. This was because the PCT had suggested that there may be more than one interpretation of this request.

10. On 26 March 2010 the complainant responded to the Commissioner. He clarified that he believed his request to mean the following:
 - i. The practice details of the doctors involved - single handed or group practices
 - ii. The ethnic origin of the doctors involved
 - iii. The ages of the doctors
 - iv. The locations of the practices
 - v. The recommendations of the enquiries
 - vi. The full details of the end results and outcomes
 - vii. Analysis by the PCT of these practices e.g. what percentage were caucasian black , Asian etc and what percentage had only foreign qualifications and what percentage had qualified from UK universities
 - viii. What percentage had the MRCGP qualifications
11. The Commissioner does not consider that point vii or viii of the complainant's clarification would fall within the scope of the request. These points relate more to the practices generally in which the relevant doctors work rather than details of the doctors and any investigation relating to them specifically. The Commissioner will only therefore consider points i to vi as information which comes within the scope of the request.
12. During the course of the Commissioner's investigation some information was provided to the complainant. This information will not therefore be dealt with further in this Notice. This was information relevant to the scope of the request which was already in the public domain at the time of the request. Upon considering the remaining withheld information, the Commissioner considers that the exemption contained at section 40(1) would be applicable to some of this information. The Commissioner has considered the application of section 40(1) as well as considering whether section 40(2) was applied correctly to the rest of the remaining withheld information.

Chronology

13. On 23 July 2009 the Commissioner wrote to the PCT to explain that the case would now be investigated as the internal review had been completed. The Commissioner asked the PCT to provide a copy of any withheld information and its arguments in support of the application of any exemptions.

14. On 28 August 2009 the PCT responded to the Commissioner. It suggested that the only outstanding part of the complainant's request was point 10 which was for details of all the doctors who have been investigated by Knowsley PCT or referred to NCAS or GMC. It provided some of the withheld information to the Commissioner and provided its arguments in support of its application of section 40(2) in order to withhold the information requested.
15. Further correspondence occurred between the Commissioner and the PCT, and as stated above some of the requested information was provided to the complainant as explained at paragraph 12 above.

Analysis

Exemptions

Section 40(1)

16. Section 40(1) states 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."

17. Upon considering the withheld information the Commissioner considers that some of that information would be exempt under section 40(1) of the Act. This is because some of the withheld information is the personal data of the complainant. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:
 - from that data, or
 - from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
18. In this instance the information is a referral of the complainant by the PCT to the NCAS and details relating to this referral. This information therefore relates to a living individual who can be

identified from it. The Commissioner therefore considers that this part of the withheld information does constitute the personal data of the complainant.

19. Section 40(1) is an absolute exemption and therefore the information held relevant to the request which constitutes the complainant's personal data is exempt under section 40(1) of the Act.

Section 40(2)

20. Section 40(2) of the Act provides an exemption for information that constitutes the personal data of third parties:

"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."

21. Section 40(3)(a)(i) of the Act states 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),"*

22. The full text of section 40 can be found in the legal annex attached to this decision notice.
23. In this case the PCT has argued that the doctors who have been investigated by Knowsley PCT or referred to NCAS or GMC and the details relating to this would constitute the personal data of

- those doctors and is therefore exempt under section 40(2) of the Act by virtue of section 40(3)(a)(i) as to release the information would breach the data protection principles.
24. In order to reach a view on the PCT's arguments the Commissioner has first considered whether the withheld information is the personal data of a third party. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:
- from that data, or
 - from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
25. In this instance the information is the details of doctors who have been investigated by Knowsley PCT or referred to NCAS or GMC. This is information which relates to living individuals who can be identified. The Commissioner therefore considers that the withheld information in this case does constitute the personal data of those individuals.
26. Such information is exempt if either of the conditions set out in sections 40(3) and 40(4) of the Act are met. The relevant condition in this case is at section 40(3)(a)(i) of the Act, where disclosure would breach any of the data protection principles. The PCT has argued that disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully". Furthermore at least one of the conditions in Schedule 2 should be met.
27. The Commissioner has firstly considered whether or not disclosure of the requested information would be fair or whether disclosure would contravene the first data protection principle. The Commissioner has therefore specifically considered the following:

Likely Expectation of the Data Subject

28. The PCT has argued that doctors would not expect that the information relevant to the request would be disclosed into the public domain. It explained that in relation to GMC investigations, the GMC's powers are derived from the Medical

- Act 1983 and subordinate legislation. It stated that section 35B(4) of that Act sets out the circumstances in which the GMC must publish details of those matters which have been dealt with under its procedures. It explained that this broadly comprises of any instances where the GMC has found that a doctor's fitness to practise has been impaired, where it has imposed an interim or permanent sanction, where a warning has been issued or where the doctor has given undertakings with regard to their future conduct. It explained that if disclosure of information in excess of that required to be disclosed by section 35B(4) was granted to the applicant, it would serve to circumvent the intention of Parliament by making publicly available details of doctors who have been referred to the GMC but in respect of whom no findings of fact have been made and no sanctions applied. It suggested that the balance struck by section 35B(4) serves to give rise to a reasonable expectation on the part of members of the medical profession that allegations which are not found to be proven or which do not result in any kind of sanction will not be disclosed into the public domain.
29. The PCT confirmed that some information about some of the doctors it had referred to the GMC, had been disclosed into the public domain. The PCT has informed the complainant where this information can be accessed. It maintained that doctors would not however expect any information to be released by the PCT over and above that which would be disclosed by the GMC under the legislation described at paragraph 28.
30. In relation to internal PCT investigations, it has explained that it has a regulatory remit with respect to doctors under the terms of the Performers List Regulations which complements that of the GMC. It explained that the PCT is careful at the investigatory stage to limit sharing of this information to that which is necessary to facilitate the investigation. It explained that the PCT may also refer matters to the NCAS. It explained that the NCAS does not have an adjudicatory function but simply supports the PCT in the discharge of its obligations under the Performers List Regulations both in terms of assessing practitioners and providing general advice as to how local performance procedures should operate. It explained that paragraph 4.1 of the NCAS handbook states that, "NCAS will not normally disclose the details of a case to a party other than the referred practitioner or their employer/contracting body, or even confirm that a case has been discussed with us." It went on to

- explain that paragraph 4.2 states that, “Within an employer/contracting body, information about concerns relating to a practitioner should only be shared with others on a ‘need to know’ basis. This should mean that most of the information will be kept by only a small number of individuals.”
31. It suggested that the NCAS guidance, which is also followed by the PCT, serves to give doctors a reasonable expectation that all investigations undertaken by the PCT under the terms of the Performers List Regulations will remain confidential, irrespective of whether a referral is made to NCAS. It suggested that this is further borne out by the PCT’s own policy on managing concerns with respect to performers (the Performance Review and Support Policy) which provides doctors with assurance that information with regard to investigations will be divulged to the fewest number of people as reasonably practicable.
 32. It explained that the PCT, by analogy to the GMC’s obligations to inform the public when it takes action against a doctor, was only under an obligation to make any removal of a doctor from its Performer’s List known to the public. Doctors who have been investigated but not removed from the Performer’s List would not expect information relating to this to be disclosed.
 33. The PCT confirmed to the Commissioner that the information which is being dealt with within this Notice does not relate to doctors who have had information disclosed publicly by the GMC, the PCT or NCAS, as the investigations did not go past a certain stage to warrant public disclosure as discussed above.
 34. The Commissioner considers that doctors who are the subject of an investigation conducted by the GMC, the PCT or NCAS, would not expect information regarding this to be disclosed into the public domain, unless the investigation got past a certain stage as discussed above.

Damage or Distress to Data Subjects

35. The PCT has suggested that where allegations against doctors have not been made out, or where any allegation has not resulted in the imposition of a sanction, disclosure of details regarding such investigations could cause distress or damage to the doctors concerned. It further stated that in the case of referrals to NCAS, such referrals may be made as part of an

effort to support a doctor who is experiencing difficulties, and disclosure may undermine the trust and confidence between the PCT, NCAS and doctors if details of referrals were placed into the public domain at that stage. Finally the PCT argued that there is a significant likelihood that disclosure could result in quantifiable loss to the doctors concerned. It explained that in relation to general practitioners who hold contracts with the PCT, they are usually paid on a capitation basis according to their patient list size. It therefore suggested that disclosure of the information sought by the applicant could serve to undermine confidence in such doctors. Existing patients may choose to obtain care elsewhere and new patients may not choose to join the patient lists.

36. The Commissioner's Guidance, Awareness Guidance 1 Section 40 Personal Information, states that public authorities should take into account the potential harm or distress that may be caused by the disclosure. The Guidance states that, "For example, there may be particular distress caused by the release of private information about family life. Some disclosures could also risk the fraudulent use of the disclosed information (e.g. addresses, work locations or travel plans where there is a risk of harassment or other credible threat to the individual), which is unlikely to be warranted. However, the focus should be on harm or distress in a personal capacity. A risk of embarrassment or public criticism over administrative decisions, or the interests of the public authority itself rather than the individual concerned, should not be taken into account."

37. The above Guidance can be accessed at the following:

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/personal_information.pdf

38. Taking into account the PCT's arguments and the Commissioner's Guidance on this issue, the Commissioner considers that disclosure into the public domain may cause significant damage or distress to the data subjects.

The Legitimate Public Interest

39. The PCT recognised that there is a legitimate interest in the public being made aware of concerns regarding doctors, particularly where this may raise issues of patient safety.

- However it suggested that this legitimate interest is met by information being made available to the public in the event that a finding is made against a doctor and a sanction is imposed by either the GMC or the PCT.
40. The Commissioner agrees that there is a legitimate public interest in being made aware of details of investigations of doctors, however the approach taken by the GMC and the PCT, in only publishing information if an investigation proceeds past a certain stage and or sanctions are imposed, goes some way to meeting this legitimate public interest.
41. In relation to information relating to doctors who have been investigated by the GMC, the PCT or NCAS, and in relation to which information has not been disclosed as the investigation did not get past a certain stage, the Commissioner considers that the legitimate interests in disclosure are outweighed by the likely expectations of the data subject and the likely effect of disclosure on the data subject. The Commissioner therefore considers that disclosure of this information would be unfair and that the section 40(2) is applicable to this information.

Procedural Requirements

Section 1(1)(b)

42. Section 1(1) of the Act states 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.”

43. In this case the PCT did not disclose information relevant to the request until the Commissioner’s investigation had commenced and therefore not within the statutory time for compliance. The Commissioner therefore considers that the PCT breached section 1(1)(b) in its handling of this request.

Section 10(1)

44. Section 10(1) of the Act 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.”

45. The Commissioner has considered whether or not the PCT complied with section 10(1) of the Act.

46. As the PCT did not comply with its obligations under section 1(1)(b) by the time of the internal review, it breached section 10(1) in its handling of the request.

The Decision

47. The Commissioner's decision is that section 40(1) would apply to some of the withheld information and that the PCT correctly applied section 40(2) in order to withhold the remaining requested information.

48. The Commissioner does however consider that the PCT breached section 1(1)(b) and section 10(1) in its handling of the request.

Steps Required

49. The Commissioner requires no steps to be taken.

Right of Appeal

50. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 sent.

Dated the 28th day of June 2010

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

General Right of Access

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 1(2) provides that -

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

Section 1(3) provides that -

"Where a public authority -

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information."

Section 1(4) provides that -

"The information -

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time

when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request."

Section 1(5) provides that –

"A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b)."

Section 1(6) provides that –

"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"."

Time for Compliance

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.

Personal information.

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) 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, 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.