

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 October 2012

Public Authority: South Essex Partnership University
NHS Foundation Trust

Address: Trust Head Office
The Lodge
The Chase
Wickford
Essex
SS11 7XX

Decision

1. The complainant made a freedom of information request to the South Essex Partnership University NHS Foundation Trust ("the Trust") for a copy of a Serious Untoward Incident Report which was produced following the murder of a member of the public by an individual who was a patient of the Trust's Mental Health Service. The Trust initially refused to disclose any information but during the course of the Commissioner's investigation disclosed a redacted copy of the report to the complainant. The redacted information continued to be withheld under the section 40(2) (personal information) and section 41 (information provided in confidence) exemptions. The Commissioner has investigated the complaint and is satisfied that the section 40(2) exemption applies.
2. The Commissioner's decision is that the Trust has complied with the FOIA by correctly withholding some of the information contained within the report under the section 40(2), personal information exemption.

Request and response

3. On 9 March 2012 the complainant made a freedom of information request to the Trust for a copy of an internal report into the case of a named individual who had committed a murder after having been in contact with the Trust.

4. The Trust responded to the request on 10 April 2012 when it confirmed that it held the requested information but that this was being withheld under the exemption in section 40 of FOIA (Personal information).
5. On 12 April 2012 the complainant asked the Trust to carry out an internal review of its handling of his request. In doing so he noted that since there had already been extensive coverage of this particular case, including "mass public exposure via the public media" any risk to individuals named in the report through disclosure would be unlikely to increase the risk that already existed due to the details that had already been published.
6. The Trust presented the findings of its internal review on 15 May 2012 and upheld its initial response to refuse to disclose the request under the personal information exemption.

Scope of the case

7. On 21 May 2012 the complainant contacted the Commissioner to complain about the decision to refuse to disclose the information he requested.
8. After having been contacted by the Commissioner the Trust decided to reconsider its response to the request and took the step of releasing some information contained within the report although a significant amount of information continued to be redacted. The complainant confirmed that he wished to pursue his complaint in respect of this information and therefore this Decision Notice is limited to the information which continues to be withheld under the personal information exemption.

Reasons for decision

9. The information falling within the scope of the request is the Trust's internal Serious Untoward Incident Report ("the report") which was undertaken following the murder of a member of the public by an individual who was a patient of the Trust's Mental Health Service. This information has been redacted by the Trust under the personal information exemption which is set out in section 40 of FOIA. During the course of the investigation the Trust confirmed that in addition it also wished to rely on the information provided in confidence exemption which is set out in section 41 of the FOIA.

10. The Commissioner has first considered the application of the personal information exemption.

Section 40 – Personal information

11. Section 40(2) provides that information is exempt if it constitutes the personal data of someone other than the applicant and disclosure would satisfy one of two conditions. In this case it is the first condition which is relevant which is that disclosure would contravene one of the data protection principles in the Data Protection Act 1998 ("the DPA").

Is the information personal data?

12. In deciding whether the exemption is engaged the first step is to consider whether the information is personal data. Personal data is defined in the DPA 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"

13. The report includes detailed information on the individual's medical history, including information gathered from his GP as well as the result of his interactions with other Health Care professionals. It also includes details of the murder and his interaction with the Trust.
14. The Commissioner is satisfied that all the redacted information is the personal data of the patient. It clearly relates to this individual, is significant and biographical to him. However, the Commissioner would also note that the redacted information also relates to members of this individual's family, his girlfriend and the deceased. Whilst none of these people are named in the report it is clear that given the publicity surrounding the case, and the uniqueness of events, they could be easily identified by disclosure.

The first data protection principle

15. Having satisfied himself that the information is personal data the Commissioner has gone on to consider whether disclosure of the

redacted information would contravene any of the data protection principles.

16. The Trust has argued that disclosure of the information would contravene the first data protection principle which requires that data be processed fairly and lawfully. It said that in its view disclosure would be unfair to the patient and the other individuals concerned, including his family members. This is because disclosure would be contrary to the principle of medical confidentiality and the individuals would have a reasonable expectation that their information would not be disclosed.
17. When considering whether a disclosure under FOIA would be fair the Commissioner's approach is to reach a balanced view after considering the following factors:
 - The expectations of the individuals
 - The possible consequences of disclosure
 - Nature and content of the information
18. However, it is important to note that the information in this case is sensitive personal data as defined in section 2(e) of the Data Protection Act 1998 as it relates to the physical, or mental health or condition of the individual concerned. Sensitive personal data, by its very nature, has been deemed to be information that individuals regard as the most private information about themselves. Further, disclosure of this type of information is likely to have a detrimental or distressing effect on the data subject. This is because it is almost self evident that to disclose someone's medical records will be unfair as in our society there is a clear expectation that medical information will remain confidential both to preserve the relationship between doctor and patient and also because the disclosure will be damaging or distressing to the data subject. Thus, the reasonable expectation of the data subject is that such information would not be disclosed and that the consequences of any disclosure could be distressing to them. For these reasons, the Commissioner has decided that disclosure of the information which the Trust continues to withhold would be unfair.
19. However, the Commissioner's view is that, notwithstanding the data subject's reasonable expectations or any damage or distress caused to him or her by disclosure, it may still be fair to disclose requested information if it can be argued that there is a more compelling public interest in releasing the information. Therefore the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the data subject against the public interest in disclosure.

20. The Commissioner would stress that this is a different balancing exercise than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Given the importance of protecting an individual's personal data the Commissioner's 'default position' is in favour of protecting the privacy of the individual. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure; that is to say any public interest in disclosure must outweigh the public interest in protecting the rights and freedoms of the data subject.
21. In this case the complainant has argued that the public interest would be served by knowing more about the circumstances leading up to the homicide and the nature of the Trust's involvement with the individual. In particular he suggested that the complainant's medical history was "inextricably linked with this unique case" and that therefore the public interest would be best served by full disclosure because, in his view, "criticisms of the Trust overlap with [the individual's] mental health records". The complainant also suggested that the individual effectively gave up his right to privacy once he committed a murder.
22. The Commissioner accepts that there is a public interest in disclosure but considers that this has largely been met by the Trust's decision to disclose the following sections of the report.
 - The scope and level of the investigation
 - The Terms of Reference
 - The Root Cause conclusions
 - The Shared Learning
 - The Distribution List
 - Recommendations
23. Disclosure of this information allows for a better understanding of the lessons learned from this incident and this is where the greatest public interest lies. Disclosure of the individual's medical history is not necessary to achieve this. In the Commissioner's view the disclosure of this information strikes the right balance between protecting the rights of the data subject and the legitimate interest in knowing more about the Trust's involvement with the individual and any failings which were made.
24. Whilst the Commissioner would accept that releasing the un-redacted report would help to further public understanding about exactly how the Trust interacted with the individual, he has to take into account the fact that the information is sensitive personal data and his responsibilities under the Data Protection Act. As he has already noted, the information is of the type most personal to an individual and which he or she would

not normally expect to be made public, and which would likely be distressing to the individuals concerned if it was disclosed. Therefore, the Commissioner's view is that there would have to be an overwhelming public interest in favour of disclosure to warrant this level of intrusion into the private lives of the individuals. The Commissioner is not satisfied that the public interest is sufficiently strong in this case. Neither does he accept the complainant's suggestion that the individual has waived his rights to privacy although, in any event, the Commissioner would also point out that disclosure of the information would also infringe the privacy of members of the individual's family.

25. In all the circumstances of the case the Commissioner has decided that disclosure would be unfair and therefore contravene the first data protection principle. Consequently the Commissioner finds that section 40(2) is engaged.

Other exemptions

26. The Trust also applied the section 41 exemption to the information redacted from the SUI report. However, since the Commissioner has decided that all of the withheld information is exempt on the basis of section 40(2) he has not gone on to consider whether this exemption would also apply.

Right of appeal

27. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0116 249 4253
Email: informationtribunal@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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

Signed

Pamela Clements
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