

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 July 2016

Public Authority: Powys Teaching Health Board
Address: Powys Health Board Headquarters
Mansion House
Bronylls
Brecon
Powys
LD3 0LS

Decision (including any steps ordered)

1. The complainant has requested access to the external investigation into Brecon Hospital in 2015 from Powys Teaching Health Board ('the Health Board'). The Health Board refused the request citing section 31(1) and section 40(2) of the FOIA. The Commissioner's decision is that the Health Board correctly relied on section 40(2), for most of the withheld information, and correctly relied on section 21 in respect of information relating to the complainant's late father. However the Health Board should have relied on section 41 in respect of this information in respect of the other deceased patient. Other than disclosing the screen print of Brecon Police Station website, the Commissioner does not require the public authority to take any steps.

Request and response

2. On 19 June 2015, the complainant wrote to Health Board and requested the following information:

"I wish to read the file of any external investigation, carried out on Brecon Hospital in 2015.

This will include the investigation terms ...to its conclusions."

3. The Health Board responded on 10 July 2015. It confirmed that it had commissioned an external independent investigation into concerns

raised about the care at Brecon War Memorial Hospital and that it does not hold information relating to any other external investigation at Brecon Hospital in 2015. However, it refused the request by virtue of section 31(1) (a) and (b) and section 40(2) of the FOIA.

4. Following an internal review the Health Board wrote to the complainant on 6 August 2015. It concluded that:

...the teaching Health Board should continue to apply these exemptions."

5. It further confirmed that the recommendations arising from the independent investigation report will be considered at the Board Meeting on 26 August 2015 and will become a public document.
6. During the Commissioner's investigation, the Health Board has continued to rely on section 40(2) in respect of most of the withheld information. However, it also confirmed that it was now relying on section 21 in respect of the information regarding the complainant's late father and section 31(1)(g) in conjunction with section 31(2)(d) (i) and (j) in respect of the information relating to patient three.

Scope of the case

7. The complainant contacted the Commissioner on 27 October 2015 to complain about the way her request for information had been handled. She provided some background information to her complaint, informing the Commissioner that she believes that the Health Board failed to include information to the external enquiry that she wished to provide, which she believes would back up the original whistleblower's complaint. The complainant added that she wants to know the content of the investigation since the information she wanted to provide to the external investigator may have changed its outcome.
8. The Commissioner's role does not extend to a consideration of whether the Health Board provided all relevant information as part of the external investigation. He can only consider whether the information is appropriate for disclosure into the public domain, and whether the Health Board correctly applied the exemptions relied on.

Reasons for decision

Section 40 – personal information

9. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its

disclosure under the FOIA would breach any of the data protection principles.

10. In order to reach a view regarding the application of this exemption, the Commissioner has firstly considered whether or not the requested information does in fact constitute personal data as defined by section 1(1) of the Data Protection Act 1998 ('the DPA').

Is the requested information personal data?

11. Personal data is defined at section 1(1) of the DPA as:

"personal data means data which relate to a living individual who can be identified-

(a) from those data,

(b) from those data and other information which is in the possession of, or 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."

12. When considering whether the information is personal data, the Commissioner has taken into consideration his published guidance: *"Determining what is personal data".¹*

13. On the basis of this guidance, there are two questions that need to be considered when deciding whether disclosure of information into the public domain would constitute the disclosure of personal data:

(i) "Can a living individual be identified from the data, or, from the data and other information in the possession of, or likely to come into the possession of, the members of the public?"

(ii) "Does the data 'relate to' the identifiable living individual, whether in personal or family life, business or profession?"

14. The Commissioner notes that the information withheld under this exemption is information which formed the basis of an external

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http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/what_is_data_for_the_purposes_of_the_dpa.pdf

investigation conducted in 2015 into allegations of bullying staff and the abuse of patients at Brecon War Memorial Hospital. The information can be divided into the personal data of both past and present employees and patients. The employee information consists of staff statements, the complaint from a former employee which prompted the investigation' including bullying claims, and general HR information of which he was the focus. The patient information relates to four former patients, two of whom are known to be deceased and have been discussed later in this notice under section 21 and section 41 of the FOIA.

15. Having considered the withheld information, the Commissioner is satisfied that it is a combination of personal and sensitive personal information as defined by sections 1 and 2 of the DPA respectively.
16. The Health Board has withheld the information under this exemption on the basis that disclosure would be in breach the first principle of the DPA.

Would disclosure contravene the first data protection principle?

17. The first data protection principle requires that the processing of personal data be fair and lawful and,
 - a. at least one of the conditions in schedule 2 is met, and
 - b. in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.
18. In the case of personal data, both requirements (fair and lawful processing, and a schedule 2 condition) must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data principle.

Would disclosure be fair?

19. In his consideration of whether disclosure of the withheld information would be fair, the Commissioner has taken the following factors into account:
 - a. The reasonable expectations of the data subjects.
 - b. Consequences of disclosure.
 - c. The legitimate interests of the public

The reasonable expectations of the data subject

20. The Commissioner's guidance regarding section 40 suggests that when considering what information third parties should expect to have

disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private life.² Although the guidance acknowledges that there are no hard and fast rules it states that:

"Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned."

21. The Commissioner's guidance therefore makes it clear that where the information relates to the individual's private life (i.e. their home, family, social life or finances) it will deserve more protection than information about them acting in an official or work capacity (i.e. their public life). However, not all information relating to an individuals' professional or public role is automatically suitable for disclosure.
22. For example, the Commissioner also recognises that there is a widespread and general expectation that details of a person's employment such as their attendance and professional development should be considered confidential.
23. The seniority of the data subject is also an important factor when considering their reasonable expectations, and in his view, the more senior a person is, the less likely it will be unfair to disclose information about him or her acting in an official capacity.
24. In this particular case, the information can be broken down into the following broad categories:

Staff statements

25. Appendix A of the withheld information consists of staff statements taken as part of the investigation process. The Health Board considers that effective investigations depend on the willingness of its staff to participate in process and provide full and open accounts. It has further argued that they do so with a reasonable expectation of confidentiality that any information they supply would only be used for the purpose of the investigation. The Health Board is concerned that disclosure of this

²http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Detailed_speculist_guides/PERSONAL_INFORMATION.ashx

information would deter individuals from providing detailed information or perhaps from even providing any at all.

26. The Commissioner acknowledges that the staff statements were given in confidence and considers that it is a reasonable assumption that the data subjects' would therefore expect that this information remains confidential. The Commissioner also notes, that the statements themselves contain data about other members of staff and that they too would also reasonably expect that their personal information remains confidential.

Details of complaint

27. The Commissioner notes that Appendices B, C, E and F a contain the details of the complaint itself including interview statements, emails, notes of meetings with the individual former member of staff, and a screen print from Brecon Police Station website.
28. With the exception of the screen print form the Police Station website, the Commissioner notes that this information contains allegations of professional misconduct of named members of staff and that the investigation was conducted in confidence. He is satisfied therefore, that the individual members of staff would have a reasonable expectation that this information would not be disclosed into the public domain.

Policies and staff training

29. Appendix D contains information in respect of certain policies, and details of staff training. It includes a list of members of staff attendance on various courses and contains their role and signatures.
30. Although the Commissioner accepts that this information relates to the data subjects' professional lives, as it forms part of their performance and development, it is fair to assume that the individual data subjects' would have a reasonable expectation of confidentiality.

Absence documents

31. The Commissioner notes that Appendix G consists of attendance records of a former member of staff.
32. In line with his guidance referred to in paragraph 22 of this notice, the Commissioner is satisfied that any employee would reasonably expect that this information is not disclosed into the public domain.

Patient information

33. Appendices H and I contain information regarding patients one and two respectively. They include medical information, incident forms, emails and photographs (not of the patients themselves but of equipment relating to the allegations).
34. The Commissioner notes that medical notes relate to the physical and/or mental health of an individual and therefore constitute sensitive personal information and has no hesitation in concluding that there would be a high expectation of confidentiality.

Consequences of disclosure

35. The Commissioner's guidance regarding the disclosure of information about employees states that:

"Disclosure is unlikely to be fair if it would have unjustified adverse effects on the employees concerned. Although employees may regard the disclosure of personal information about them as an intrusion into their privacy, this may often not be a persuasive factor on its own, particularly if the information relates to their public role rather than their private life."

Staff statements

36. The Health Board considers that investigations of this nature depend on the willingness of members of staff to participate in the process to provide full and open accounts of their recollection of particular events and colleagues. If this information was disclosed, it would not only be distressing to the data subjects' but is likely to deter staff from participating in such investigations in the future.
37. The Commissioner has no hesitation in accepting these arguments and considers that they are entirely consistent with his position regarding information of this nature.

Details of complaint

38. The Commissioner considers that the disclosure of information as specified in paragraph 27 of this notice, i.e. containing allegations of professional misconduct against specified individuals is highly likely to result in distress to the data subjects'.

Policies and staff training

39. Consistent with the Commissioner's guidance regarding the disclosure of information in relation to the professional development of public sector

employees, the Commissioner considers that the disclosure of information referred to in paragraph 29 of this notice is likely to be viewed as unnecessarily intrusive by the data subjects and has concluded that such an intrusion would not be justified.

Absence documents

40. Similarly, the Commissioner's guidance in respect of the disclosure of information regarding periods of absence of public sector employees, the Commissioner considers that the data subject is likely to view it as intrusive and may result in some distress and has concluded that such an intrusion would not be justified.

Patient information

41. The Commissioner notes that the information referred to in paragraph 33 of this notice contains information regarding patients one and two and includes incident forms, emails and photographs (not of the patients themselves but of equipment relating to the allegations).
42. The Commissioner would wish to highlight the long established principle of patient confidentiality, and has no hesitation in concluding that the disclosure of this information would be highly likely to result in distress to the data subjects' as well as likely to undermine the general confidence of patients of the Health Board, that their medical information will not be disclosed to the public.

The legitimate public interest in disclosure

43. Notwithstanding the data subjects' reasonable expectations, or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.
44. The Commissioner notes that the complainant has a personal interest in obtaining this information as stated in paragraph 7 of this notice. He also notes that there is likely to be a public interest in the disclosure of details of an investigation into professional misconduct at a hospital within the Health Board's boundaries.
45. However, he also notes that the complainant was informed with the outcome of the Health Board's internal review that the recommendations of the investigation would be made public. The Health Board has further confirmed that a media statement addressing the concerns was published whilst the investigation was on-going, and considers that this should be sufficient to satisfy the requirements of the public without the need to disclose the full details.

46. In weighing up the balance between the reasonable expectations of the data subjects and the consequences of disclosure of the disputed information, against the legitimate public interest in disclosure, the Commissioner has taken into consideration the personal interest the complainant has in the disclosure of this information, as well as the public interest in the disclosure of information regarding an investigation of this nature.
47. He has also noted the Health Board's confirmation that a media statement was issued during the investigation process and that the outcome of the investigation and its recommendations were published following its completion. However, he considers that the balance is weighted significantly in favour of the reasonable expectations of the data subjects and the consequences of the disclosure of this information would not be fair to those data subjects and would result in a breach of principle one of the DPA. Consequently, he is satisfied that the Health Board appropriately withheld the disputed information on the basis of section 40(2) of the FOIA.

Section 21 – Information accessible to the applicant by other means

48. The Health Board has refused to disclose the information in respect of Appendix K by virtue of section 21 of the FOIA.
49. Section 21 of the FOIA provides an exemption to information which is reasonably accessible to the applicant otherwise than under section 1 of the FOIA. The purpose of the section 21 exemption is to ensure that there is no right of access to information via FOIA if it is available to the applicant by another route. Therefore, unlike most exemptions, the circumstances of the applicant can be taken into consideration.
50. Although the information may be available elsewhere, a public authority will need to consider whether it is actually 'reasonably accessible' to the applicant before it can apply section 21. Defining 'reasonably accessible' is open to interpretation, however it generally applies to the following:
 - Information available via the public authority's publication scheme will be reasonably accessible to an applicant.
 - There is another existing, clear mechanism by which the particular applicant can reasonably access the information outside of FOIA. For example, under the Access to Health Records Act 1990.
51. Section 21 is an absolute exemption which means that where the exemption is engaged, a consideration of the public interest test is not necessary.

52. The Health Board has explained that this information relates to the complainant's deceased father and is already in her possession. The Commissioner notes that he has previously investigated another complaint from the complainant under case reference FS50525753 and that this information should already be in her possession.
53. The Commissioner notes that the Health Board has taken the personal circumstances of the complainant into consideration when deciding whether to disclose this information and this is consistent with bullet point 2 of paragraph 50 of this notice. He also considers that it is not an unreasonable assumption that documents already provided to the complainant will be 'reasonably accessible' to her. The Commissioner is therefore satisfied that section 21 of the FOIA is engaged in respect of this information.

Section 41 – Information provided in confidence

54. The Commissioner notes that the information contained in Appendix J cannot be withheld under section 40(2) as the patient is now deceased and that the Health Board has relied on section 31(1)(g) in respect of this information.
55. However, there appears to be strong similarities with previous decisions that the Commissioner has made regarding deceased persons medical records considered under section 41 of the FOIA, and in particular, the case of *Bluck v ICO & Epsom and St Helier University Hospital NGHS Trust [EA/2006/0090]*. In this case, the appellant was seeking the disclosure of her deceased daughter's medical records, but the daughter's next of kin, her widower who was also her personal representative, had objected.
56. Section 41(1) of the FOIA states that:

Information is exempt information if –
 - (a) *It was obtained by the public authority from any other person (including another public authority), and*
 - (b) *The disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person"*
57. Section 41 is an absolute exemption, therefore is not subject to the public interest under the FOIA.
58. The Commissioner notes that the information in question was provided by a former employee and contains details of his complaint in respect of

patient three and patient four of the investigation. Such third party information was provided both to the Health Board in confidence and the Commissioner considers that disclosure of this information may constitute an actionable breach of confidence.

59. In his analysis of whether disclosure of the information would constitute an actionable breach of confidence the Commissioner has considered:
- whether the information has the necessary quality of confidence;
 - whether the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information and to the detriment of the confider.
60. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial.
61. In this case, the disputed information is an email sent to the Health Board from a third party.
62. The Commissioner has seen no evidence that the withheld information has been put in the public domain, particularly as the Health Board has withheld it as falling within the scope of this wider request. He is therefore satisfied that the information is not accessible by other means.
63. The Commissioner also notes that the information in question would not be considered trivial to either the individual or the relatives of the third parties.
64. The Commissioner is satisfied that the withheld information has the necessary quality of confidence and has therefore gone on to consider whether the information was imparted in circumstances importing an obligation of confidence.
65. The information was provided to the Health Board on a voluntary basis from a former employee as part of his wider complaint against Brecon War Memorial Hospital with an implicit obligation of confidence.
66. The Commissioner has therefore gone on to consider whether disclosure of the information would be to the detriment of the confider.
67. The Commissioner is mindful of the Tribunal's decision in the case of *Bluck v ICO & Epsom and St Helier University Hospital NGHS Trust [EA/2006/0090] paragraph 15* that the loss of privacy can be a detriment in its own right. There is no need therefore for there to be any

detriment to the confider in terms of tangible loss in order for it to be protected by the law of confidence other than the loss of privacy in its own right.

68. In this particular case, the Commissioner considers disclosure of the information into the public domain as a loss of privacy and is likely to cause distress and detriment to the confider, as well as the relatives of patient three and patient four.
69. Section 41 is an absolute exemption therefore there is no requirement to consider the public interest test. However, within the Common Law of Confidence, there is a defence to an action for a breach of confidence, if it can be demonstrated there was an over-riding public interest defence. The Commissioner has therefore gone on to consider whether there is a public defence for a breach of confidence.
70. The Commissioner accepts that there may be a public interest in the disclosure of the information and acknowledges that the complainant has a personal interest in this information. However, in weighing this against the public interest in keeping the information confidential, the Commissioner has been mindful of the need to protect the relationship of trust between the confider and the confident; and the need not to discourage or otherwise hamper a degree of public certainty that such confidences will be respected by a public authority.
71. The Commissioner considers that the public interest in disclosing the information does not outweigh the public interest in maintaining that trust. He therefore finds that the Health Board would not have a public interest defence for breaching its duty of confidence and that the request for information is exempt under section 41 of the FOI. He has therefore concluded that although the Health Board did not rely on this exemption that section 41 of the FOIA is engaged in respect of this information.

Right of appeal

72. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

73. 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.
74. 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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF