Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 March 2019

Public Authority: Barts Health NHS Trust
Address: 9 Prescot Street
London
E1 8PR

Decision (including any steps ordered)

1. The complainant has requested information relating to the suppressed numbers from the disclosed information for cancelled operations. Barts Health NHS Trust (the Trust) refused to provide the suppressed numbers citing the exemption under section 40(2) of the FOIA (third party personal data) as its basis for doing so.

2. The Commissioner's decision is that the Trust has incorrectly applied section 40(2) of FOIA to the withheld information.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

    - To disclose the 3 suppressed numbers from 2015/16 and 2016/17 for the cancelled operations for the categories 'no X-ray' and 'Unknown'.

4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 31 August 2018 the complainant made the following request for information:

'*Under the Freedom of Information Act, I would like to request the total number of operations cancelled for non-clinical reasons, broken down by the cause of the cancellation, for example due to lack of beds, operating theatre capacity, staffing issues, and equipment failures.*

Please provide this information for each of the past five financial years (i.e. years running from April to March - 2013/14, 2014/15, 2015/16, 2016/17, 2017/18).

In the total number of operations, broken down by cancellation reason, please include:

Elective operations cancelled at the last minute. For the purposes of this request, last minute means on the day the patient was due to arrive, after the patient has arrived in hospital or on the day of the operation or surgery.

Cancelled urgent operations.

If the data is collected by the trust, please also provide a separate total for each year for all operations cancelled for non-clinical reasons, regardless of how soon before the scheduled operation time the cancellation occurred.

Please send this information in a spreadsheet or CSV format.'

6. On 26 November 2018 the Trust provided a spreadsheet for the information with the numbers suppressed as <5 where the number of cases are small. The Trust applied section 12 and section 21 to the information about cancelled urgent operations.

7. On 29 November 2018, the complainant requested an internal review only about the suppressed numbers withheld under section 40 (personal data). She referred to tribunal and other decisions that supported the release of small numbers:

http://www.bailii.org/uk/cases/UKUT/AAC/2018/229.html

https://www.england.nhs.uk/statistics/statistical-work-areas/cancelled-elective-operations/

https://www.england.nhs.uk/statistics/wp-content/uploads/sites/2/2013/04/risk-of-disclosure-cancelled-elective-operations-final.doc

8. On 18 January 2019 the Trust provided the outcome of the internal review for the suppressed numbers only. It upheld the decision to refuse to provide the small numbers in case of inadvertent identification of the individuals concerned.

Scope of the case

9. On 18 January 2019 the complainant contacted the Information Commissioner about the citing of section 40 to refuse the suppressed numbers and after the internal review was concluded the case was accepted on 23 January 2019.

10. The Commissioner will not investigate the citing of section 12 and 21 as this was not brought as a complaint to the Trust during the internal review or to the Commissioner as part of this investigation.

11. The Commissioner notes that the Trust disclosed information from the first quarter of 2018/19. However, this is not part of the requested information for the past 5 financial years from 2013 to 2018 and is outside the scope of this case.

12. Therefore, the Commissioner considers the scope of this case to be to determine if the Trust has correctly applied section 40(2) FOIA to the withheld information i.e. the suppressed numbers from the disclosed information for cancelled operations 2013 to 2018.

Reasons for decision

Section 40 Personal information

13. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

14. In this case the relevant condition is contained in section 40(3A)(a)[1]. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation (GDPR) ('the DP principles').

15. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (DPA). If it is not personal data then section 40 of FOIA cannot apply.

16. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

Is the information personal data?

17. Section 3(2) of the DPA defines personal data as:-

> "*any information relating to an identified or identifiable living individual*".

18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

19. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

20. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

21. The Commissioner has been provided with the withheld information and notes that there are 2 numbers (relating to the two of 11 categories for cancelled operations of 'no X-ray' and 'unknown') that have been suppressed from the list in 2015/16 and one from the 'unknown' category of 2016/17. The total numbers of cancelled operations for these years were 1129 and 1438.

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[1] As amended by Schedule 19 Paragraph 58(3) of the Data Protection Act 2018

22. The information in this case doesn't directly identify individuals by name. However, because the name of an individual is not known, it does not mean that an individual cannot be identified. The Commissioner's guidance on what is personal data[2] states the following:

    'A question faced by many organisations, particularly those responding to Freedom of Information requests, is whether, in disclosing information that does not directly identify individuals, they are nevertheless disclosing personal data if there is a reasonable chance that those who may receive the data will be able to identify particular individuals.'

    It also states:

    'The starting point might be to look at what means are available to identify an individual and the extent to which such means are readily available. For example, if searching a public register or reverse directory would enable the individual to be identified from an address or telephone number, and this resource is likely to be used for this purpose, the address or telephone number data should be considered to be capable of identifying an individual.

    When considering identifiability it should be assumed that you are not looking just at the means reasonably likely to be used by the ordinary man in the street, but also the means that are likely to be used by a determined person with a particular reason to want to identify individuals. Examples would include investigative journalists, estranged partners, stalkers, or industrial spies.'

23. The Commissioner directed the Trust to the recent first tier tribunal decision which considered the suppression of small numbers http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1995/Miller,%20Claire%20EA-2016-0265%20(20.04.17).pdf and the Upper Tribunal decision which upheld the decision that individuals would not be identified if the small numbers were disclosed. (Information Commissioner v Miller – GIA/2444/2017 (EA/2016/0265)

24. The Trust stated that it believes that the 3 suppressed figures are personal data as they relate to individual patients that had cancelled

[2] https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf & https://ico.org.uk/media/for-organisations/documents/1549/determining_what_is_personal_data_quick_reference_guide.pdf

operations. It believes that the '*identity of the patients could be discerned through further Freedom of Information requests, approaches to staff, patients and visitors. This could have adverse consequences for the patients themselves by being contacted by third parties and the nature of their treatment being revealed to the wider world in a method that they did not consent to. A journalist actually called a member of Trust staff to reveal actual numbers and identities of patients relating to another Freedom of Information request and offered them a reward for doing so, this clearly demonstrates the lengths a motivated intruder is willing to take to identify patients*.'

25. Therefore the Trust stated that it believed '*that it should protect the privacy of its patients as they would expect. However we do recognise that we need to be proportional in revealing the small range of patients effected (sic) by cancelled operations and be accountable to the public for this*.'

26. In response to the complainant's references to other organisations that have revealed exact numbers similar to these the Trust acknowledged that NHS England does routinely publish exact numbers below 5 on a quarterly basis for NHS Trusts, '*however it doesn't break these figures down further into the categories that we've provided*.'

27. However, the Commissioner is not convinced that the 3 suppressed numbers identifying the number of operations cancelled for 'no X-ray' or 'unknown' reasons would lead to the identification of the individuals themselves. Of the thousands of operations carried out in the Trust each financial year, the Trust has disclosed the small range of patients affected by cancelled operations. It listed the numbers in 11 categories (from no bed to emergency priority) for the total numbers of 1129 and 1438 cancelled operations in 2015/16 and 2016/17.

28. Although there is potentially a risk of self-identification in that a person may point to the suppressed number for 'no X-ray' in 2015/16 and decide that their cancelled operation in 2015/16 was one of those few, it is not clear to the Commissioner how someone else could link the number to an identifiable individual. There is no information in the list relating to the type of operation or the illness of the patient. There is no information by reference to an identifier such as a name, an identification number, location data or an online identifier and no information with any biographical significance.

29. The Commissioner considers that the information does not relate to a living person and does not relate to a person who is identifiable. It is not reasonable to assume that individuals from such a large population of operations and cancelled operations for the financial year in the Trust as a whole could be identified if the 3 suppressed numbers were disclosed.

30. Therefore, the Commissioner is satisfied that the requested information in this case does not constitute personal data. As it is not personal data then section 40 of FOIA cannot apply and the Commissioner does not need to go on to determine whether disclosure would contravene any of the data protection principles.

31. In conclusion the Commissioner has decided that the Trust has failed to demonstrate that the exemption at section 40(2) is engaged.

Right of appeal

32. 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

33. 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.

34. 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 .....

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