

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 February 2013

Public Authority: Monitor
Address: 4 Matthew Parker St.
London
SW1H 9NP

Decision (including any steps ordered)

The complainant has requested information relating to an inquiry made by Monitor regarding an NHS Foundation Trust. Monitor disclosed some of the requested information, however it refused to disclose the remainder, citing sections 31, 33 and 41 of FOIA as a basis for non-disclosure. The Commissioner's decision is that section 31(1)(g) by virtue of section 31(2)(c) of FOIA is engaged in relation to the entirety of the withheld information and that the public interest in all the circumstances of the cases favours maintaining the exemption. Therefore the Commissioner requires no steps to be taken.

Request and response

1. On 19 January 2012, the complainant wrote to Monitor and made the following request:-

"1. On 4th January 2012, Mr Robert Woolley, Chief Executive of University Hospitals Bristol NHS Foundation Trust (UHBT), presented a document to South Gloucestershire Health Scrutiny Select Committee that contained this statement:

"Monitor recognised that the Independent Inquiry demonstrated that the Trust was not an outlier in terms of the clinical impact of histopathology on patient care."

Please send me the evidence that demonstrates to you that the Trust is not an outlier in terms of the clinical impact of histopathology on patient care. I expect to see comparative information with other Foundation Trusts.

2. Mr Woolley's statement also says "Monitor noted.....Evidence

of good practice in the governance of patient safety and risk management in the Trust."

Please send me the evidence (i.e. that it works in practice and is not just documented) of good practice you have seen in the governance of histopathology, which I assume you satisfied yourselves can be related back to the many examples of good practice guidance issued by the Royal College of Pathologists and National Institute for Clinical Excellence.

3. Please send me copies of all communications between Monitor, UHBT Board Chair Dr John Savage, CEO Mr Robert Woolley and NHS Bristol Chief Executive Ms Deborah Evans relating to UHBT histopathology concerns, from June 2009 to the present - without redactions.
4. It is clear that Monitor did not pick up on UHBT's histopathology problems when the trust was applying for Foundation Trust status. Has Monitor put in place any processes for identifying such skeletons in the cupboard in respect of current and future Foundation Trust applications? If so, please provide details.
2. The complainant clarified her request on 23 January 2012 in response to correspondence from Monitor. Monitor responded on 20 February 2012. It disclosed some of the requested information to the complainant, however it stated that the remaining requested information was exempt from disclosure under sections 31, 33 and 41 of FOIA. It applied some minor redactions to the information it provided, as this contained personal details of junior officials.
3. Following an internal review Monitor wrote to the complainant on 27 March 2012. It disclosed some further information which was relevant to her complaint, however it continued to withhold some information ("the withheld information") citing sections 31, 33 and 41 of FOIA as a basis for non-disclosure. The reviewer stated that Monitor was now seeking to apply the exemption under section 41 of FOIA to all of the withheld information, except for one document. Therefore, Monitor was seeking to apply the exemptions under sections 31, 33 and 41 to all of the withheld information other than one document, to which it sought to apply sections 31 and 33.

Scope of the case

4. The complainant contacted the Commissioner on 4 August 2012 to complain about the way her request for information had been handled.

5. The complainant specifically asked the Commissioner to consider whether the above sections of FOIA had been correctly applied to the withheld information.

Reasons for decision

Section 31(1)(g) of the FOIA in conjunction with 31(2)(c)

6. Section 31(1) of the FOIA states that:

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice— ...

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)"

The purposes in subsection (2) cited by Monitor are:

(c) "the purposes of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise."

7. The Commissioner finds that the use of the word "ascertaining", i.e. determining definitely or with certainty, limits the application of this exemption to those cases where the public authority in relation to whom the prejudice is being claimed, has the power to formally ascertain compliance with the law and judge whether any person's conduct is improper. The Commissioner acknowledges that this is likely to limit the use of these limbs of the exemption to law enforcement or regulatory bodies, of which Monitor is one.
8. Section 31(1)(g) states that, information is exempt if it would or would be likely to prejudice any public authority in the exercise of its functions for any of the purposes specified in subsection (2). The purpose specified at subsection (2) (c) is the purpose ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise. The Commissioner is satisfied that Monitor does have a relevant function, as it is a body which authorises and regulates NHS Foundation Trusts. The Commissioner must therefore first determine whether the prejudice claimed is likely to occur and if he is satisfied that it is he must then consider the public interest in this case.
9. Monitor explained to the Commissioner that its regulatory framework necessitates the generation of a significant amount of detailed information to examine whether an NHS Foundation Trust is exercising its functions in a prescribed manner. Monitor considers that disclosure of such information would be likely to prejudice the relationship between Monitor and the Trust and would

therefore be likely to affect the ability of Monitor to carry out its functions effectively.

10. Monitor further explained that, although it has statutory powers which enable it to require disclosure of information to it by NHS Foundation Trusts, Monitor is better able to exercise its functions if such information is provided to it voluntarily, thereby maintaining an open and honest relationship between regulator and regulated body.
11. Furthermore, the withheld information is the subject of recent and on-going regulatory supervision to assess whether circumstances exist or would arise which would justify regulatory action in pursuance of an enactment. Disclosure of such information to the public would be likely to prejudice such an assessment and thereby cause prejudice to Monitor's functions for the purpose specified in subsection 31(2)(c) of FOIA.

Public interest test

12. The public interest test as set out in section 2(2)(b) of FOIA is whether "*in all of the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information*". The Commissioner has considered the public interest arguments both in favour of maintaining the exemption and of disclosure of the withheld information.

Public interest arguments in favour of disclosure

13. Monitor accepts that there is a general and strong public interest in disclosing information to further the accountability of NHS foundation trusts and of Monitor to the public and to foster openness and transparency regarding Monitors activities. The Commissioner agrees that this is a strong public interest argument.
14. The Commissioner also notes more specifically that one of the aims and objectives of NHS Foundation Trusts is to be accountable to the public. That, coupled with the innate public interest in Monitor's effectively carrying out its regulatory functions, forms a strong argument in favour of disclosure of the withheld information.

Public interest arguments in favour of maintaining the exemption

15. The Commissioner considers that there is a strong public interest in allowing the regulator of NHS foundation trusts to be able to carry out its functions efficiently and effectively – and to have the space and freedom to consider, without concern as to publication, whatever information it requires in such circumstances. Any disclosure, in particular premature disclosure, which would cause Monitor to have to reconsider requesting sensitive information which is necessary to

carry out its statutory function of regulating NHS foundation trusts would be detrimental to the process of regulation, which would not be in the public interest.

16. The Commissioner also accepts that disclosure of the information could affect the relationship of openness and honesty between Monitor and the NHS Foundation Trusts which it regulates. This may affect Monitor's ability to effectively carry out its regulatory functions, which would not be in the public interest.

Balance of the public interest arguments

17. The Commissioner considers that there is a significant public interest in preserving the relationship of trust and confidence and the free flow of information from NHS foundation trusts to Monitor in order to enable Monitor to effectively regulate those Trusts.
18. However, the Commissioner is also of the view that Monitor and the Trusts it regulates should demonstrate to the public that they are open, transparent and accountable and that there is an efficient and effective system in place to ensure that the Trusts are properly regulated and run smoothly.
19. The Commissioner notes that a large part of the requested information has been disclosed to the complainant and that Monitor regularly makes public a considerable amount of information regarding its regulatory process. However, Monitor has informed the Commissioner that the withheld information in this case relates to recent and ongoing regulatory supervision of a Trust, and its premature disclosure would be likely to prejudice this.
20. The Commissioner, having taken all public interest arguments into account, considers that, in all the circumstances of the case, the public interest favours maintaining the exemption. He has accorded significant weight to the fact that Monitor makes efforts on a regular basis to keep the public informed of its activities and that a large part of the requested information in this case has been disclosed. He considers that this is sufficient to inform public debate, whilst not causing prejudice to an ongoing inquiry. Since the Commissioner considers that the exemption under section 31(1)(g) by virtue of 31(1)(c) applies to the entirety of the withheld information, he has not gone on to consider Monitor's application of the exemptions under sections 33 and 41 of FOIA.

Right of appeal

21. 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

22. 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.
23. 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

Rachael Cragg
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