

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 November 2014

Public Authority: Monitor
Address: Wellington House
133 – 135 Waterloo Road
London
SE1 8UG

Decision (including any steps ordered)

1. The complainant made a freedom of information request to Monitor for information relating to a complaint he had previously raised with that organisation against University Hospital Southampton NHS Foundation Trust. Monitor refused the request under the exemption in section 31(1)(g) (law enforcement) of FOIA.
2. The Commissioner's decision is that section 31(1)(g) is engaged and the public interest in maintaining the exemption outweighed the public interest in disclosure. The Commissioner also found that Monitor complied with sections 10(1) and 17(1) of FOIA in that it responded to the request within 20 working days. The Commissioner requires no steps to be taken.

Request and response

3. On 6 July 2014 the complainant made a request to Monitor for information related to a complaint he had made about University Hospital Southampton NHS Foundation Trust's ("the Trust") handling of freedom of information requests and subject access requests made under the Data Protection Act 1998. The request read as follows:

"This is a request under the provisions of the Freedom of Information Act (2000) for copies of the enquiries sent by Monitor to the

Southampton Trust regarding their 'completeness of disclosure'. I would also request a copy of the response sent to Monitor by the Trust."

4. Monitor responded on 4 August 2014 when it confirmed that it held the requested information. However, it said that the request was being refused under the exemptions in section 31(1)(g) (law enforcement) and section 40 (personal information).
5. The complainant subsequently asked Monitor to carry out an internal review of its handling of the request and it presented its findings on 3 September 2014 which upheld the initial response to the request.

Scope of the case

6. On 11 September 2014 the complainant contacted the Commissioner to complain about Monitor's decision to refuse his request. He also complained about the timeliness of the Trust's response which he said exceeded the 20 working day deadline.

Reasons for decision

Section 31 – Law enforcement

7. The withheld information in this case comprises of a number of letters passed between Monitor and the Trust and accompanying emails. The Commissioner has first considered the Trust's application of the section 31 exemption to refuse to disclose the requested information. The specific exemption relied on by Monitor is 31(1)(g). This provides that information is exempt if disclosure would or would be likely to prejudice the exercise by any public authority of its functions for any of the purposes specified in section 31(2).
8. In this case the relevant purpose is that listed in section 31(2)(c) – the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.
9. In order to engage the exemption the Commissioner requires the function identified by the public authority for the purposes of section 31(1)(g) to be a function which is:
 - i. designed to fulfil one of the purposes specified in section 31(2) and,

- ii. imposed by statute (or in the case of a government department, authorised by the Crown) and,
 - iii. specifically entrusted to the relevant public authority to fulfil (rather than just a general duty imposed on all public authorities).
10. Under the Health and Social Care Act 2012 Monitor is responsible for the licencing of providers of health services (Chapter 3 of Part 3 of the 2012 Act) including NHS Foundations Trusts. Section 94 of the 2012 Act sets out licence requirements, including governance arrangements, and it is the responsibility of Monitor to enforce this. Therefore, the Commissioner is satisfied that Monitor has a specific statutory duty to carry out regulatory action in respect of the governance arrangements.
11. Monitor argues that the exemption is engaged as disclosure would prejudice its ability to carry out its regulatory activities as it would make it harder to gather information effectively and efficiently. This is because, it argues, the organisations it regulates would be less willing to share information with the Trust and would be less inclined to cooperate with its investigations as well as damaging its relationships with these organisations.
12. The Commissioner has considered Monitor's arguments and is satisfied that disclosure would have the effects it suggests. In his view the Trust would have a reasonable expectation that the information it provided to Monitor would not be disclosed and this is reinforced by the frankness of the Trust's response to Monitor. The Commissioner also notes that whilst it is Monitor's policy to release information about complaints when it carries out enforcement action, in the complainant's case no formal investigation was commenced and no enforcement action was taken.
13. In the Commissioner's view disclosure would make it harder for Monitor to carry out its regulatory functions effectively as the Trust would be less likely to cooperate with Monitor's investigations in future. This could be due to a loss of frankness in responses given to the Trust, refusing to provide information voluntarily or delays in responding to Monitor's enquiries. For these reasons the Commissioner has decided that section 31(1)(g) is engaged. The Commissioner has now gone on to consider the public interest test, balancing the public interest in disclosure against the public interest in maintaining the exemption.

Public interest test

Public arguments in favour of disclosure

14. The complainant argued that the public interest favoured disclosure because it would help to show the extent to which the Trust was meeting its obligations under the FOIA and Data Protection Act 1998.
15. For its part, Monitor said that it had taken the following arguments into account when balancing the public interest:
 - *There is a general public interest in disclosing information that would hold Monitor to account and increase transparency in how we perform our functions. The handling of complaints is a matter of public interest and importance. Compliance with provider licence conditions is central to Monitor's regulatory functions. Monitor's policy is set out in its Enforcement Guidance (28 March 2013) and its Risk Assessment Framework. Disclosure of regulatory correspondence in this case would evidence how Monitor deals with complaints and how it operates in the context of the policies it has established.*
 - *Compliance by NHS foundation trusts with statutory requirements (including the FOI Act) and the establishment of proper and appropriate governance arrangements is an important feature of their overall effectiveness. Monitor's role is to ensure a high standard of corporate governance. The information in this case evidences the standards at the Trust and the role Monitor performs in monitoring those standards. Public confidence in the standards achieved by NHS foundation trusts is a matter of legitimate public interest.*
 - *In this case, the transparency of the Trust's position would be supported by disclosure of its response to Monitor.*

Public interest in maintaining the exemption

16. Monitor advanced the following arguments in favour of maintaining the exemption:
 - *There is a strong public interest in Monitor being able to operate an efficient, effective and expeditious complaints procedure. Monitor's policy is to build the trust and confidence of those whom it regulates, such that they are willing to voluntarily share information with us. Disclosure of the information in this case would damage*

relationships with this Trust and, given their expectations in relation to the manner in which we regulate, the sector generally.

- *A loss of trust and confidence, and any unwillingness to provide information voluntarily, would delay the course of our enquiries and investigations. Monitor's statutory functions must be exercised in order to protect the users of health services as a whole. Whilst [the complainant] has a direct personal interest in the circumstances of this case, Monitor's statutory remit concerns the protection of service users as a whole. Monitor has corresponded with [the complainant] in relation to his complaint and the enquiries that were undertaken. In the circumstances I consider this is a strong factor in support of maintaining the exemption.*

Balance of public interest arguments.

17. First of all the Commissioner has considered the arguments in favour of disclosure. The Commissioner accepts that disclosure would increase transparency in how Monitor deals with complaints. However, the Commissioner would also say that this public interest is reduced in light of the fact that Monitor already publishes information on its investigations. For instance, Monitor publishes details of cases where it takes formal regulatory action as well as publishing its Enforcement policy and its Risk Assessment Framework. The Commissioner also considers that the information in this case has only limited value given that no formal investigation was commenced and no enforcement action was taken following the complaint against the Trust.
18. The Commissioner would also note that much of the complainant's arguments for disclosure focused on what he perceived to be the poor care he received from the Trust. The Commissioner wishes to stress that nothing in the withheld information would shed light on this issue or increase transparency or public understanding of the level of care provided by the Trust.
19. As regards the arguments for maintaining the exemption the Commissioner takes the view that there is a strong and inherent public interest in protecting the conduct of investigations and proceedings. In this particular case there is a significant public interest in ensuring that Monitor remains able to carry out its regulatory activities effectively, including by building and maintaining relationships with the organisations it regulates.
20. The Commissioner notes Monitor has powers to compel the organisations it regulates to provide it with information and therefore there is an argument that the public interest in maintaining the

exemption is reduced because any reluctance on the part of the organisations to provide information would not prevent it from carrying out its investigation. The Commissioner does accept that this affects the weight that should be given to the public interest in maintaining the exemption. However, it is also important to note that the information in this case was provided to Monitor voluntarily. If organisations were reluctant to provide information voluntarily or to cooperate with Monitor to the fullest extent this would make its investigations more time consuming and less efficient, even if ultimately it would be able to rely on its statutory powers to ensure that organisations provide it with the information it needs to carry out its investigations.

21. Monitor has already informed the complainant about the outcome of his complaint against the Trust and there is very little to be gained by disclosure that is of wider public interest. There is nothing particularly remarkable or compelling about the withheld information which would increase the need for disclosure. Therefore, the Commissioner has decided that on balance and in all the circumstances of the case, the public interest in maintaining the section 31(1)(g) exemption outweighs the public interest in disclosure.

Section 40(2) – Personal information

22. Monitor had also applied the section 40(2) exemption to the names of individuals mentioned in the withheld information. The Commissioner has not undertaken an analysis of this exemption as he is satisfied that all of the withheld information is exempt on the basis of section 31(1)(g).

Section 10 – Time for compliance

Section 17 – Refusal of a request

23. As noted above, the complainant had also complained about what he said was Monitor's failure to respond to his request within 20 working days.

24. Section 10(1) of FOIA 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.

25. Section 17(1) of FOIA provides that:

A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

- (a) states that fact,*
- (b) specifies the exemption in question, and*
- (c) states (if that would not otherwise be apparent) why the exemption applies.*

26. Therefore, there will be a breach of section 17(1) if a public authority which intends to refuse a request fails to issue a refusal notice within 20 working days. In this case the complainant made his request on 6 July 2014 and Monitor responded on 4 August 2014. The complainant argues that the response was due on 1 August 2014. Ordinarily this would be true, however, during this period there were two bank holidays within the UK on 14 July (Northern Ireland) and 4 August (Scotland). Therefore, the 20th working day following the date of the request was in fact 5 August 2014 and so Monitor's refusal notice was within the 20 working day deadline and there was no breach of the FOIA. It is important to note that section 10 of FOIA defines a working day as "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." This means that a day which is a bank holiday in any of the four nations of the UK is a non-working day for the purposes of the FOIA.

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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

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