

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 August 2016

Public Authority: Cardiff and Vale University Health Board
Address: University Hospital of Wales
Heath Park
Cardiff
CF14 4XW

Decision (including any steps ordered)

1. The complainant requested a copy of the full, un-redacted independent enquiry report submitted by Fiona Smith, Debbie Lymn and Professor Fiona Patterson to Cardiff and Vale University Health Board ('the Health Board') and a copy of the recommendation of the panel to the Health Board for daily staffing number for each clinical area. The Health Board refused the request under sections 21, 31(1)(g), 40(2) and 41 of the FOIA. During the course of the Commissioner's investigation, the Health Board disclosed the recommendation for daily staffing figures. The Commissioner's decision is that the Health Board has correctly applied section 31(g) to the remaining withheld information. The Commissioner does not require any steps to be taken.

Request and response

2. On 25 August 2015 the complainant wrote to the Health Board and requested information in the following terms:

"Under the provisions of the Freedom of Information Act 2000, we seek disclosure of the following:

1. *A copy of the original, complete and un-redacted independent enquiry report ('the Report') submitted by Fiona Smith, Debbie Lymn and Professor Fiona Patterson to Cardiff and Vale UHB (as opposed to the published reported dated 18 May 2015); and*

2. *A copy of the recommendation of the panel to the Cardiff and Vale UHB for the daily staffing numbers for each clinical area within UHW ES (referred to at page 23, paragraph R31 of the Report”.*
3. The Health Board responded on 24 September 2015 stating that the information requested was exempt from disclosure under sections 21, 31, 40(2) and 41 of the FOIA. It also provided a link to the published version of the report in question.
4. On 11 November 2015 the complainant requested an internal review of the Health Board’s refusal to disclose the information requested.
5. The Health Board provided the outcome of its internal review on 10 December 2015 and upheld its position that that the information requested was exempt from disclosure under sections 21, 31, 40(2) and 41 of the FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 17 March 2016 to complain about the way his request for information had been handled.
7. During the course of the Commissioner’s investigation the Health Board disclosed a copy of the recommendation of the panel for daily staffing numbers (item two of the request). The Health Board confirmed that it applied section 31(1)(g) together with 31(2)(j) to all of the withheld information and that it considers parts of the withheld information to also be exempt under sections 21, 40(2) and 41.
8. The Commissioner considers the scope of this complaint is to determine whether the Health Board should disclose the remaining withheld information, or whether it was correct in relying on the exemptions claimed.

Reasons for decision

Background

9. The Health Board commissioned an independent enquiry in order to investigate concerns raised by the Royal College of Nursing ('RCN') members. The concerns raised centred around the following themes:
 - Bullying and harassment
 - Poor practices of care causing patient harm
 - Targets being the priority instead of patient focus
 - Poor and inadequate staffing levels
10. The terms of reference of the independent enquiry were agreed between the Health Board, the RCN and Unison. The enquiry panel was commissioned in late December 2014 and commenced on site on 7 January 2015. The panel submitted a report to the Health Board to check for factual accuracy on 1 April 2015 and the final report was subsequently issued on 18 May 2015.
11. The Health Board has published a version of the final report¹, which runs to 28 pages and provides detail about the aims and methodology of the independent enquiry. The published report also includes the findings and recommendations of the enquiry. Further information about the independent enquiry is available on the Health Board's website²

Section 31 – Law enforcement

12. Section 31 provides a prejudice-based exemption which protects a variety of law enforcement interests. Consideration of this exemption is a two-stage process. Firstly, in order for the exemption to be engaged it must be at least likely that disclosure would prejudice one of the law enforcement interests protected by section 31 of FOIA. Secondly, the exemption is subject to a public interest balancing test. The effect of this

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<http://www.cardiffandvaleuhb.wales.nhs.uk/sitesplus/documents/1143/CVUHB%20A%26E%20report%20findings%20and%20recommendations%20FS%20QA%201%20July%202015.pdf>

² <http://www.cardiffandvaleuhb.wales.nhs.uk/draft-eu-page>

is that the information should be disclosed if the public interest favours this, even though the exemption is engaged.

13. As stated above, an abridged copy of the report has been published which includes details of the aims and methodology of the independent enquiry and their findings and recommendations. The Health Board has applied section 31(1)(g) together with section 31(2)(j) to all parts of the full report which have not been published.
14. The relevant parts of section 31 of the FOI provide that:
 - (1) 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),
 - (2) The purposes referred to in subsection (1)(g) to (i) are –
 - (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.
15. The Commissioner will therefore consider whether the Health Board exercises a relevant function for the purposes specified in section 31(2)(j) of the FOIA, the likelihood of prejudice to that function if the requested information were to be disclosed and whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The Health Board's function for the purposes of Section 31(2)(j)

16. For the exemption to be engaged, the Commissioner requires the function identified by the public authority in relation to section 31(1)(g) to be a function which is specifically entrusted to that public authority to fulfil. The Commissioner is aware that healthcare authorities have specific statutory duties to protect the health and safety of patients against risks posed by the delivery of healthcare services. Section 45(1) of the Health and Social Care (Community Health and Standards) Act 2003 ('HCSA 2003') places a duty on all NHS bodies to:

"put in place arrangements for the purposes of monitoring and improving the quality of that health care provided by and for that body".
17. The Commissioner considers that this function places a duty on NHS bodies to protect the health and safety of patients against risks arising

out of or in connection with the services it provides. The Health Board has argued that as part of its statutory function of providing NHS services to the public it is necessary to ensure that the services are provided in a manner which protects patients against risks to their health and safety which arise out of or in connection with the actions of its staff and the Commissioner accepts this argument.

18. The Commissioner is satisfied that the Health Board performs a relevant function in relation to section 31(1)(g) of the FOIA and the Health Board exercises this function for the purposes of protecting persons (patients) other than persons at work against health or safety arising out of or in connection with the actions of persons at work as outlined in section 31(2)(j).

Likelihood of prejudice occurring

19. The terms of reference for the independent enquiry can be found at paragraph P9 of both the full and published reports. These terms of reference show that the enquiry was established to ascertain whether the provision of care to patients was being compromised due to the prevailing organisational culture, whether patient care arrangements had resulted in harm to any patient and whether the prevailing organisational culture had resulted in harm to any employee.
20. As the report makes clear, the enquiry was carried out in private. The methodology was deliberately adopted by the enquiry team to ensure that it had the confidence of witnesses and was able to carry out its work effectively without participants being concerned about what was going to be made public about their roles. Part 4.1 of the published report sets out the methodology adopted by the enquiry team. Paragraph P15 states that:

“The investigation was undertaken in private. The interviews were voluntary. By adopting this approach, we were able to gain detailed testimony from key individuals who were prepared to talk to the panel”

Paragraph P28 of the published report goes on to state:

“Individuals were assured that notes of meetings and statements submitted as part of the review would not be shared outside of the Enquiry and that the report would not include attributable information”.

21. The independent enquiry commenced in January 2015 and the final report produced on 18 May 2015. The independent enquiry made a series of recommendations to the Health Board which it is still in the process of implementing. As such, although the enquiry itself had been

concluded at the time of the request, the Health Board considers that the issues raised in the report remain very much live.

22. The Health Board is of the view that disclosure of the full report (which would inevitably reveal the identities of individuals) would be inappropriate in light of the methodology adopted by the enquiry team and the expectations this set for individual witnesses.
23. The Health Board is also concerned that disclosure of the full report would make it more difficult for future enquiries of a similar nature to be conducted. This is because individuals would be less likely to engage freely and frankly with such enquiries for fear that subsequent publication may lead to detrimental treatment or even trial by media. This in turn would undermine the effectiveness of such enquiries.
24. The Health Board considers it is important that individuals who participate in investigations into serious concerns about service provision, including the care of patients, organisational culture and staffing issues are robust and reliable are assured they are able to conduct discussions in a free and frank manner with the expectation that information they provide will remain confidential. Disclosure of information which has been collected in confidence essentially into the public domain would be likely to deter staff from cooperating with such investigations in the future. It would also make staff less likely to provide full and frank contributions to similar future investigations. This in turn will adversely affect the quality of information available to reviewers in future investigations and be detrimental to the Health Board's ability to exercise its functions under section 45(1) of the HSCA 2003.
25. The Commissioner has reviewed the withheld information and notes that whilst some of the aims of the review relate to patient care it also looked at staffing arrangements, including sickness absence and control, and the general culture within certain hospital units and whether bullying, harassment or inappropriate behaviour took place. The withheld information also includes direct quotes and details of incidents relayed/reported by individuals to the enquiry panel.
26. Much of the withheld information in this case can be fairly categorised as frank and open exchanges about particularly sensitive matters. The Commissioner considers that, based on the content of parts of the withheld information, and the advice given to those who participated in the enquiry about confidentiality there was a strong expectation on the part of those involved that the information they provided would not be published in a way that would be attributable to them.

27. The Commissioner considers that there is a real and significant risk that disclosure would have a negative impact on the voluntary supply and free flow of candid information. Taking into account the subject matter, the content of the withheld information and the Health Board's representations, the Commissioner accepts that disclosure would be likely to prejudice the Health Boards' ability to protect persons other than persons at work against risk to health and safety arising out of or in connection with the actions of persons at work.
28. Whilst the report of the independent investigation was finalised in May 2015, based on the representations provided by the Health Board, the Commissioner accepts that the subject matter was still 'live' at the time of the request as the Health Board was, and still is, in the process of implementing the recommendations contained within the report. As the issue was still 'live' the Commissioner considers that the likelihood of disclosure impacting on the Health Board's ability to exercise its functions under section 45(1) of the HSCA 2003 remained relatively high at the time of the request. Therefore the Commissioner considers that section 31(1)(g) with section 31(2)(j) is engaged in relation to the withheld information.

Public interest test

29. The exemption under section 31(1)(g) with section 31(2)(j) of the FOIA is qualified which means that the information in question should only be withheld where the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

30. The Health Board acknowledges that there is a public interest in the work of the enquiry because it was set up to investigate serious concerns about the emergency unit, including the care of patients, organisational culture and staffing issues.
31. The Health Board also accepts that disclosure would further public understanding of how the emergency unit was being run, whether any issues may have affected patients or staff and whether any lessons could be learned about improving this frontline service.
32. In light of the public interest in the subject matter, the Health Board proactively released the published version of the report. The Health Board believes that the published report is sufficient to meet any public interest in disclosure and it strikes a balance between providing information to the public without undermining its ability to investigate future concerns, and protecting the rights of individuals involved in the enquiry.

33. The complainant considers that there is an obvious public interest in accessing the full report as the public has a right to understand the full extent of any failures within the emergency unit and what is being done about them. He considers that disclosure of the published, redacted report runs the risk of reducing public confidence in the Health Board's ability to protect the public because of the lack of transparency. It also gives an appearance that the Health Board does not wish to reveal the full extent of the problems in the emergency unit and/or protecting individuals found to have bullied and harassed members of staff. He understands that the members of staff identified in the report as guilty of such actions have not been subject to any disciplinary action.
34. The complainant considers that any suggestion that disclosure of the full report would make it more difficult to conduct such enquiries in the future is unfounded and mere speculation at best. He also considers that rather than deter individuals from co-operating in future enquiries, full disclosure would have the opposite effect. This is because individuals would be confident that issues they raise are openly acknowledged and properly investigated in a fully transparent manner.

Public interest arguments in favour of maintaining the exemption

35. The Health Board considers that the key public interest argument in favour of maintaining the exemption is that disclosure would undermine the effectiveness of future independent enquiries. This is because individuals would be less likely to provide make full and frank contributions for the purpose of such investigations in the future. In this case, the independent enquiry was conducted in private for the purpose of ensuring that it had the confidence of witnesses. The prospect of disclosure of information collected in connection with a highly sensitive investigation would adversely affect the quality of information available to such independent enquiries in the future.
36. If the Health Board's ability to undertake effective independent enquiries is prejudiced this could lead to important lessons not being learned. Ultimately this could compromise the ability of the Health Board to protect and maintain the safety of its patients. The Health Board considers there is a very strong public interest in preventing such an outcome occurring.

Balance of the public interest test

37. In reaching a view on where the public interest lies in this case, the Commissioner has taken into account the nature of the withheld information. Much of the withheld information contains frank comments and recollections of individual situations as examples of practices within the Health Board. The Health Board has also applied section 40(2) to

this information, where disclosure would lead to the identification of a living individual. In addition, although the final report was issued in 18 May 2015, the Commissioner accepts that the enquiry was still live at the time of the request in that the Health Board was implementing the recommendations contained within the report.

38. The Commissioner accepts that there is a legitimate public interest in informing the public about investigations carried out, particularly in cases like this where the investigation relates to provision of care in frontline services. However the Commissioner agrees that the Health Board has met this legitimate interest through disclosure of the published report, which contains details of the methodology adopted, and all of the findings and recommendations of the panel.
39. Turning to the complainant's argument that the Health Board is protecting individuals identified within the report found to be demonstrating inappropriate behaviours and actions. The Commissioner notes that paragraph P10 of the report makes it clear that "This independent enquiry is not part of any disciplinary process" and the enquiry's terms of reference does not include reaching conclusions in relation to any specific allegations against individuals. The Commissioner notes that recommendation R45 of the published report refers to addressing the particular needs and behaviours of individuals. It explains that details of the recommendations for named individuals has been removed to maintain their right to confidentiality and confirms that the Health Board will take the recommendations forward through its own internal processes. The Commissioner has not, therefore attributed any weight to the complainant's argument in this respect.
40. The Commissioner agrees with the Health Board that there is a strong public interest in protecting its ability to conduct effective investigations. As with previous cases the Commissioner is of the view that there is merit to the 'chilling effect' arguments presented by the Health Board. She acknowledges the likelihood that disclosure of the withheld information would result in individuals being less likely to provide detailed and frank information; this would result in prejudice to the Health Board's functions of improving services and protecting against a risk to the health and safety of individuals such as the residents.
41. Taking into account the subject matter, the content of the withheld information and the Health Board's representations, the Commissioner considers that section 31(1)(g) with section 31(2)(j) is engaged in relation to the withheld information.

Right of appeal

42. 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

43. 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.
44. 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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