

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 January 2018

Public Authority: South Tees Hospitals NHS Foundation Trust
Address: The James Cook University Hospital
Marton Road
Middlesbrough
TS4 3BW

Decision (including any steps ordered)

1. The complainant has requested the agenda and board papers for a private session of the South Tees Hospitals NHS Foundation Trust board meeting. The Trust disclosed the majority of the information but withheld two documents containing relevant information and their associated agenda items on the basis of section 36(2)(b)(i), (ii) and (c).
2. The Commissioner's decision is that the Trust has correctly applied the provisions of section 36(2)(c) and the public interest supports maintaining the exemption. She requires no steps.

Request and response

3. On 6 June 2017 the complainant wrote to South Tees Hospitals NHS Foundation Trust ("the Trust") and requested information in the following terms:

"Under the Freedom of Information Act, please send me the agenda and all the papers from the private session of the South Tees trust board of directors meeting held on June 6."

4. The Trust responded on 4 July 2017. It stated that the requested information was exempt from disclosure under section 36(1)(b), 36(2)(b)(i), (2)(b)(ii) and 2(c) of the FOIA. The Trust outlined the public interest arguments it had considered in reaching this conclusion.

5. Following an internal review the Trust wrote to the complainant on 28 July 2017. It stated that it upheld the decision to withhold the requested information under the cited subsections of section 36.

Scope of the case

6. The complainant contacted the Commissioner on 7 August 2017 to complain about the way his request for information had been handled.
7. During the course of her investigation the Commissioner was informed by the Trust that it now intended to disclose the majority of the requested information with the exception of some personal information contained in a report on the basis of section 40(2) and two documents and their associated agenda items on the basis of section 36(2).
8. The complainant, having received this information, confirmed he was content with the information withheld under section 40(2) but asked the Commissioner to consider whether the remaining two items had been correctly withheld under the section 36 exemptions.
9. The Commissioner considers the scope of her investigation to be to determine if the Trust has correctly applied the section 36(2) exemption to withhold the remaining two documents and their agenda items.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

10. The Trust considers that sections 36(2)(b)(i), (ii) and (2)(c) are engaged in relation to the information it continues to withhold. The Commissioner has viewed this information and notes that the withheld documents contain information on proposals and plans for the future of the Trust.
11. Section 36(2)(b)(i) provides an exemption where disclosure would, or would be likely to, inhibit the free and frank provision of advice. Section 36(2)(b)(ii) provides the same in relation to the exchange of views. Section 36(2)(c) provides an exemption where disclosure would, or would be likely to, prejudice the effective conduct of public affairs in a manner other than that specified elsewhere in section 36.
12. In determining whether any of the limbs of the exemption were correctly engaged, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:

- Ascertain who the qualified person is,
 - Establish that they gave an opinion,
 - Ascertain when the opinion was given, and
 - Consider whether the opinion was reasonable.
13. The Trust sought the view of its Chief Executive on 7 June 2017 and her opinion was provided on 8 June 2017. The Commissioner is satisfied the Chief Executive is a qualified person as defined in section 36(5) of the FOIA.
14. The qualified person has stated that her opinion is that the prejudice 'would be likely' to occur. It is on this basis that the Commissioner will consider whether the qualified person's opinion is reasonable.
15. When considering whether the opinion is reasonable the Commissioner is not required to determine whether it is the only reasonable opinion that can be held on the subject. It is quite possible for two people to hold differing views on the same issue, both of which are reasonable. Nor is it necessary for the Commissioner to agree with the qualified person's opinion.
16. The Commissioner has seen the submission produced by Trust staff upon which the opinion of the qualified person was based. This included a summary of the information to be withheld, an explanation of the section 36 exemption and a brief analysis of the public interest arguments.
17. The Trust has argued it is important that some matters discussed in private meetings remain private to protect confidentiality. Specifically where the issues relate to matters in the earlier stages of discussion or strategic thinking, involve advice from external sources, relate to option papers or contain advice from professionals or legal advisers. In these circumstances the Trust argues it is important for members of the Trust Board to be able to discuss matters formally but freely and frankly to ensure that issues are fully debated and final decisions are robust.
18. It is therefore the view of the qualified person that disclosing the information would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberations.
19. The Commissioner has reviewed these documents and the information they contain and notes that they are provided as part of a presentation on future plans and in a document discussing a new system. For section 36(2)(b)(i) and (ii) to be engaged it should be reasonable to see how

disclosing this information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation or the free and frank provision of advice or to otherwise prejudice the effective conduct of public affairs. For section 36(2)(c) to apply it should be clear how disclosure of the specific information would be likely to otherwise prejudice the effective conduct of public affairs.

20. The Commissioner's approach to section 36(2)(c) is that this should only be cited where none of the other exemptions in part II of the FOIA are relevant. That section 36(2)(c) uses the phrase 'otherwise prejudice' means that it relates to prejudice not covered by sections 36(2)(a) or (b). In other words, information may be exempt under both 36(2)(b) and (c) but the prejudice claimed under (c) must be different to that claimed under (b).
21. The qualified person gave their initial opinion at a time when the Trust was still recommending withholding all papers and agenda items. However, the situation has now changed and only limited information is continuing to be withheld. The Commissioner considered that the submission lacked clarity as to how the arguments the qualified person was asked to give an opinion on applied to each of the subsections of the exemption.
22. As such the Commissioner asked the Trust to clarify the nature of the prejudice in relation to section 36(2)(c) before determining which limb of the exemption was the 'primary limb' to be considered.
23. In correspondence with the Commissioner, the Trust explained that the presentation document is a forward looking document detailing potential proposals for the future. The Trust stated it was undergoing a patient involvement exercise regarding whether certain service changes should be made and the decision about these service changes would affect the decision on whether to go ahead with the proposal.
24. The Trust therefore considers there was a significant risk that disclosure of this information would have led to a large number of queries, prejudice to the Trust's relationship with the public and prejudice to the ongoing patient engagement exercise. This would all cause a diversion of resources to combat the increased scrutiny. In addition to this, the Trust had concerns that disclosing the presentation could lead to the public perception that a decision had already been made making any subsequent consultation exercise pointless.
25. Another concern raised by the Trust is that disclosure may have put the board under pressure to take particular actions whether this be confirming or denying actions or making statements on its position prematurely when it would be more appropriate for the board to

continue the public engagement exercise and to keep an open mind as to future options by maintaining time and a space for consideration without public comment and scrutiny.

26. With regard to the other information that is being withheld relating to a potential new system and expressions of interest; the Trust considered disclosure would generate queries and publicity and prejudice its ability to consider and implement strategic proposals. This in turn would affect its decision making process by forcing the Trust to prematurely confirm its position and be bound by the details in the document despite the ongoing nature of the process. The Trust argued that disclosure would also undermine the statutory consultation exercise that will take place and therefore prejudice the effective conduct of public affairs.
27. For 36(2)(c), the Commissioner recognises that this may refer to an adverse effect on a public authority's ability to offer an effective public service or to meet its wider objectives or purpose. In the Trust's view, it is reasonable to consider that the disclosure of the requested information may lead to a number of outcomes.
28. In the Commissioner's view it is not unreasonable to engage section 36(2)(c) given the nature of the withheld correspondence. The Commissioner has initially focused solely on section 36(2)(c) as the most appropriate limb to apply in the circumstances.

Public interest arguments in favour of disclosing the information

29. Many of the public interest arguments provided by the complainant related to the decision to withhold all of the requested material on a "blanket" basis. As this is not the case anymore the Commissioner has taken into account only the arguments which are still relevant.
30. The complainant argued that matters discussing important details about public services funded by the taxpayer at a time of significant public interest in the effective delivery of those services against a background of severe financial difficulties, staff shortages and rising demand would be in the public interest to be made available.
31. The complainant also argued that Trust board members should expect to be held accountable and scrutinised for decisions and to show how they have made them. He further stated that if their views or decisions are altered for fear of public disclosure then they would be in breach of their positions in their statutorily accountable roles or contravene standards expected by their professional bodies and this should not be a basis for withholding information.

32. The Trust recognises the public interest in promoting accountability and transparency of decisions taken and how public money is spent. It also accepts that disclosing the requested information would assist in the public debate on matters of interest and that the documents containing withheld information discuss subject matters that may affect many patients.

Public interest arguments in favour of maintaining the exemption

33. With regard to section 36(2)(c), the Commissioner considers that the relevant public interest arguments in favour of maintaining the exemption follow on from other limbs of the exemption (36(2)(b)(i) and (ii)) that were also cited by the Trust.
34. The Trust argued that when preliminary discussions have taken place and plans formulated or decisions made; information is placed in the public domain via press releases or minutes of meetings. For major issues the Trust conducts public consultations in order to inform the public and seek their views on proposed developments.
35. The Trust believes it is in the public interest that officials have discussions about service delivery that allow for free and frank exchanging of views in a protected environment. Without this, the Trust argues that staff may not feel they can express themselves honestly and this would impact on the decision making process.
36. Following on from this, premature disclosure of information when discussions are still taking place would impact on stakeholder relationships and on the wider initiatives taking place. The Trust considers that having a safe space to discuss options is in the public interest as it allows for better decision making.
37. With regard to the presentation the Trust considers there is a public interest in protecting the ongoing patient engagement exercise and 'live' matter of future options which require further debate. It also places weight on the fact the information is likely to be published in the future.
38. For the other information the Trust argues it needs to consider various options and engage in consultation and full debate and it needs the space to do this. Any prejudice to this would not be in the public interest.

Balance of the public interest arguments

39. In the Commissioner's view, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would be likely to prejudice the effective conduct of public affairs, she must give weight to that opinion as a valid piece of evidence in her assessment of

the balance of the public interest. However, she must also consider the severity, extent and frequency of the prejudice.

40. The Commissioner recognises the documents in question contain information which relate to live matters. In the case of the presentation decisions had not been reached and would be dependent on whether or what service changes occurred. This was to be decided following a consultation. It seems clear that disclosing a presentation revealing the future plan if certain services changes occur would be likely to have some influence over how things progressed. The Commissioner does not consider prejudicing this process would be in the public interest as it is important for the effective conduct of public affairs that public authorities can reach conclusions without undue public scrutiny and concerns that decisions have been unduly influenced by public perceptions.
41. The Commissioner would also argue this is true for the proposal for a new system and expressions of interest. The Trust has argued a 'safe space' is needed to consider proposals without scrutiny and having to divert resources to manage any increased enquiries.
42. In forming a view on the balance of the public interest in this case, the Commissioner has taken into account the general public interest in the openness and transparency of NHS Trusts particularly in any new initiatives or proposals which may have an impact on the public purse.
43. In this case she does not consider that the public interest in disclosure is an interest which would counteract the public interest in the Trust's ability to conduct its affairs effectively, specifically the Trust's ability to make impartial decisions on strategic priorities and plans likely to affect members of the public.
44. The Commissioner does not consider the arguments for disclosing the information are particularly strong in this case and given the nature of the withheld information she has concluded that the public interest in not prejudicing the effective conduct of public affairs is much stronger.
45. The Commissioner is satisfied that the Trust has correctly withheld the information under section 36(2)(c) of the FOIA.

Right of appeal

46. 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

47. 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.
48. 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

Jill Hulley
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