

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 May 2018

Public Authority: South Devon and Torbay Clinical Commissioning Group

Address: Pomona House
Oak View Close
Torquay
TQ2 7FF

Decision (including any steps ordered)

1. The complainant has requested a copy of a community eating disorder evaluation report presented to South Devon and Torbay Clinical Commissioning Group ("the CCG"). The CCG refused to provide this on the basis of sections 43, 36 and 41 of the FOIA.
2. The Commissioner's decision is that the CCG has failed to demonstrate that any of the cited exemptions are engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the community eating disorder evaluation report.
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 5 June 2017, the complainant wrote to South Devon and Torbay Clinical Commissioning Group ("the CCG") and requested information. The response to this request (sent on 21 July 2017) resulted in a further information request being made to the CCG in the following terms:

"You state that "A community eating disorder evaluation report has been presented to the CCG".

Please could you:

- 1) Provide me with a copy of this report.*
 - 2) Tell me when this report was submitted to the CCG."*
6. The CCG responded on 15 August 2017. It stated that the report was intended for future publication so could not be disclosed. It further explained the document was an internal, sensitive document so could not be shared publicly at the time of the request.
 7. The complainant requested an internal review on 16 August 2017 for a number of reasons but specifically he was unhappy the refusal did not cite specific exemptions under the FOIA.
 8. Following an internal review the CCG wrote to the complainant on 1 September 2017. It stated that it maintained the document should be withheld and cited section 43(2) and 36(2) of the FOIA as a basis for refusing the request.

Scope of the case

9. The complainant contacted the Commissioner on 11 September 2017 to complain about the way his request for information had been handled.
10. During the course of her investigation the CCG also sought to apply section 41 of the FOIA as a basis for withholding the report. The Commissioner therefore considers the scope of her investigation to be to determine if section 41, 43 or 36 of the FOIA provide a basis for withholding the community eating disorder evaluation report.

Reasons for decision

Section 43(2) – prejudice to commercial interests

11. Section 43(2) provides an exemption from disclosure for information which would or would be likely to prejudice the commercial interests of

any person (including the public authority holding it). This is a qualified exemption and is therefore subject to the public interest test.

Commercial Interests

12. "Commercial interests" in the context of this exemption encapsulates a wide variety of activities. In this case the withheld information is the Community Eating Disorder Pilot Evaluation report. This was a report created and designed by Devon Partnership NHS Trust ("DPT") in order to be better informed about this service area. The CCG were presented with this report by DPT for information purposes and it formed part of the DPT Senior Management Board meeting held in May 2017.
13. Having considered the withheld information the Commissioner is satisfied that it relates to a commercial activity. The report assesses the viability of operating a community based eating disorder service and discusses the financial aspects of this.

Likelihood of Prejudice Occurring and Affected parties

14. In order for the exemption to be engaged it is necessary for it to be demonstrated that disclosure of information would result in some identifiable commercial prejudice which would or would be likely to affect one or more parties.
15. The ICO has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; i.e. either prejudice 'would' occur or prejudice 'would be likely to' occur.
16. With regard to likely to prejudice, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15).
17. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
18. In this case the CCG has stated that disclosure of the information would prejudice its own interests and that it would prejudice the interests of the DPT.

19. In relation to its own interests, the CCG stated that disclosing the report without the consent of DPT would be detrimental to its working relationship in the future. This would inhibit best outcomes for patients and service users and impact on the use of public money. It also argued that disclosing the report would jeopardise the work undertaken by DPT and compromise their position to conduct their business with good outcomes.

20. The Commissioner considered that the arguments provided by the CCG suggest that it considers that the fact that information is commercial in nature is sufficient grounds for engaging the exemption. The Commissioner approached the CCG again to ask for further arguments to demonstrate the alleged prejudice that would occur to either its own or DPT's commercial interests if the report were to be disclosed.

21. The CCG responded and stated that:

"As part of the review of the management of eating disorder patients within Devon, as well as the requirements of Parity of Esteem, the CCG has reviewed the Coroner's Reports, Serious Case Reviews and relevant National Institute for Health and Care Excellence (NICE) guidance relating to this patient cohort to understand the type of service that should be commissioned. The CCG has worked with DPT to understand what the outcomes were from previous services, however as the requirements of the specification were outlined, based on current need, it is likely that any new service will be implemented following a formal procurement, the release of such reports as outlined would be disadvantageous to the DPT as one of the potential tenderers and ultimately compromise the CCG procurement process. This review has taken some time, due to the complexities of such a service as well as ensuring that recently published NICE guidance was taken into consideration."

22. However, even where the lower threshold for engaging the exemption is being relied upon (that disclosure would be likely to result in prejudice) authorities need to identify specific harm, link it to specific information and explain how disclosure would cause the ascribed harm.

23. The Commissioner notes that at the time of the request, and up to the date of this notice, no procurement exercise or tendering was ongoing or expected for work to implement a new service based on the evaluation report presented by DPT. Therefore, her concern is to determine if the CCG has sufficiently demonstrated that the disclosure of the specific withheld information – the evaluation report – would have prejudiced either the CCG's or DPT's commercial interests.

24. The Commissioner notes that the CCG's submissions do not make any reference to specific elements of the withheld information and are more generic in nature.
25. The Commissioner has viewed the withheld information and it contains an evaluation of the pilot programme; this includes feedback from the service from users and information on staffing and approximate costs for implementing the service. The Commissioner recognises disclosing this information would give an insight into how DPT ran the pilot evaluation but without more specific financial details and a full breakdown of services and costs it is difficult to see how this would be disadvantageous to either DPT or the CCG if a future procurement exercise was run.
26. In terms of the prejudice to the CCG; the Commissioner considers that the arguments presented are speculative and entirely based on hypothetical consequences that could only arise if there was a genuine prejudice to the commercial interests of DPT who could then take action against the CCG. As such, she does not accept that the CCG has demonstrated a causal link between disclosure of the specific information that has been withheld and the potential prejudice to the CCG's commercial interests.
27. In terms of the stated prejudice to the commercial interests of third parties; the CCG's main argument is that disclosing the report may impact on DPT's ability to compete in a future procurement exercise and for there to be a *"level playing field"*.
28. In this case the CCG did consult with DPT and provided evidence of this to the Commissioner and she notes that DPT did not themselves provide any specific argument relating to the prejudice that may result from disclosure of the report.
29. The Commissioner is not convinced the CCG has made the link between disclosure of the actual information and the proposed prejudice. The information is an evaluation of a pilot scheme and whilst it does contain some very high level figures on costs this information is based on a snapshot of a pilot and it has not been sufficiently demonstrated that disclosing this would impact on any future procurement or even that there is any prospect of any procurement exercise for this type of service in consideration. In fact DPT even describes the report as *"not a business case and is not a complete assessment of the overall position/need for services."*
30. Having considered the submissions the Commissioner has concluded that the CCG has failed to clearly define the actual prejudice and to make concrete the causal link between the information being disclosed

and the prejudicial effects occurring. In light of this, she has concluded that the CCG has not shown that disclosure of the information would result in prejudice to the commercial interests of any of the parties identified or to itself.

31. On the basis of the available evidence, the Commissioner has concluded that in respect of all the withheld information, the council has failed to demonstrate that section 43(2) is engaged. As she has found that the exemption is not engaged the Commissioner has not gone on to consider the public interest test.

Section 36 – prejudice to the effective conduct of public affairs

32. The council relied on section 36(2)(b) and (c) to withhold some of the information falling within the scope of the complainant's request.

33. Section 36(2)(b) and (c) provides that:

'Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act -

...(b) would, or would be likely to, inhibit –

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation...'

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

34. For the Commissioner to agree that section 36(2)(c) of the FOIA is engaged she must:

- (i) ascertain who the qualified person was for the council;
- (ii) establish that an opinion was given;
- (iii) ascertain when the opinion was given; and
- (iv) consider whether the opinion given was reasonable.

35. During the Commissioner's investigation it came to her attention that, in this particular case, the qualified person's opinion on the application of this exemption had not been sought. Usually, the Commissioner would expect to receive information detailing when the qualified person had been consulted, when the opinion had been obtained and what

information the qualified person had seen in order to reach this opinion. She would also expect this information to demonstrate that the qualified person's opinion was obtained prior to this decision being communicated to the complainant, whether this was in the initial response or internal review response.

36. In this case however the Commissioner notes that this did not happen. The exemption was applied to this request and communicated to the complainant at the internal review stage without seeking the qualified person's opinion first. The initial response from the CCG to the Commissioner's inquiries about this stated that the Director and Head of Service at DPT had expressed their decision to the CCG not to share the report and it was considered this qualified the application of the exemption.
37. The Commissioner provided the CCG with another opportunity to demonstrate that the CCG's qualified person had been provided with relevant information and arguments to provide an opinion that this exemption would be engaged but received the same reply in response.
38. As the CCG has not provided this information and, the application of this exemption is dependent upon it being authorised by the qualified person, the Commissioner has no alternative but to conclude that section 36(2)(b) and/or (c) of the FOIA is not engaged in this case.

Section 41 – information provided in confidence

39. This exemption provides that information is exempt if it was obtained by the public authority from any other person and the disclosure would constitute an actionable breach of confidence.

Was the information obtained from another person?

40. The first step is for the Commissioner to consider whether the information was obtained by the CCG from any other person in order to satisfy the requirement of section 41(1)(a).
41. In this case the information was provided to the CCG by DPT.
42. Having established that the withheld information was obtained from another person, the Commissioner must next consider whether or not its disclosure to the public (otherwise than under the FOIA), would constitute a breach of confidence 'actionable' by that or any other person.

Actionable claim for breach of confidence

43. Whilst it is not the only test for establishing confidence, the Commissioner finds that the appropriate test for this case is that which is set out in the case of *Coco v Clark* [1969] RPC 41. According to the decision in this case a breach of confidence will be actionable if:
- the information has the necessary quality of confidence;
 - the information was imparted in circumstances importing an obligation of confidence; and
 - there was an unauthorised use of the information to the detriment of the confider.
44. All three elements must be present for a claim to be made. However, for that claim to be 'actionable' within the meaning of section 41(1)(b) of the FOIA, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed. This requires consideration of whether or not there would be a public interest defence to such a claim.

Necessary quality of confidence

45. For information to have the necessary quality of confidence it must be more than trivial and not otherwise accessible. The CCG argues that the DPT view the information as being of importance on the grounds that the report contains business intelligence.
46. The Commissioner is satisfied that the information in this case, that being an evaluation of a pilot of a community eating disorder service, is not trivial.
47. However, as stated above, this alone is not sufficient to indicate that the material has the necessary 'quality of confidence'. Therefore the Commissioner has considered whether the information is otherwise accessible.
48. The CCG was informed by DPT that the information has not entered the public domain. It cannot therefore be said to be so readily accessible that it could no longer be regarded as confidential. The Commissioner accepts the detail of the evaluation report is not otherwise accessible and therefore accepts that the withheld information in this case has the necessary quality of confidence.

Obligation of confidence

49. Even if information is to be regarded as confidential, a breach of confidence will not be actionable if it was not communicated in

circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.

50. Neither the CCG nor DPT has specifically referred to any confidentiality agreements relating to this information. The Commissioner notes that DPT states that the information was disclosed to the CCG in circumstances importing an obligation of confidence.
51. Whilst this is not compelling evidence of a duty of confidence the Commissioner does accept that as DPT state they provided the information in circumstances in which there was an implied duty of confidence, the CCG has demonstrated the obligation of confidence in this case.

Detriment to confider

52. Having considered whether the information in this case was imparted in circumstances giving rise to a duty of confidentiality and had the necessary quality of confidence, the Commissioner must also consider whether unauthorised disclosure could cause detriment to the confider.
53. DPT have stated that disclosure of this information would cause them detriment. This is not expanded upon by the CCG other than to reiterate that the information contains business intelligence. The Commissioner has also looked at the arguments given in relation to section 43 to see if there are any relevant concerns expressed and notes that these primarily relate to the alleged impact of disclosing commercial information on DPT. As already discussed the Commissioner has not accepted that the CCG has sufficiently demonstrated there would be a prejudicial impact on DPT by disclosing the report and it is therefore also difficult to accept there would be a detriment to DPT should the information be disclosed.
54. The Commissioner notes that there have been no arguments presented to explain the perceived detriment and it is not for the Commissioner to apply arguments on behalf of the CCG or to speculate further as to what the detriment would be. The CCG was informed by the Commissioner when this exemption was applied at a late stage of the investigation that it must justify its position and was provided with the Commissioner's guidance on how she deals with complaints,¹ which clearly states that it

¹ http://www.ico.org.uk/for_organisations/freedom_of_information/guide.aspx

is the responsibility of the public authority to satisfy the Commissioner that information should not be disclosed and that it has complied with the law.

55. The Commissioner considers that the CCG has been provided with sufficient opportunity to provide its detailed rationale for withholding the report.
56. She has therefore concluded that the CCG has not sufficiently demonstrated that there would be detriment to the confider. Therefore, the Commissioner considers that the test of confidence fails on this limb and section 41 does not apply in this case.

Right of appeal

57. 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

58. 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.
59. 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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