

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 29 March 2019

**Public Authority:** Northern Devon Healthcare NHS Trust  
**Address:** 23 Castle Street  
Barnstaple  
EX31 1ET

#### **Decision (including any steps ordered)**

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1. The complainant has requested a report produced by the Royal College of Obstetricians and Gynaecologists (RCOG) into the North Devon Hospital's maternity unit. Northern Devon Healthcare NHS Trust (the trust) refused to disclose the information citing sections 36(2)(b) and (c) of the FOIA.
2. The Commissioner's decision is that the trust is entitled to withhold the requested information under section 36(2)(b) of the FOIA and the public interest rests in maintaining the exemption.
3. The Commissioner does not require any further action to be taken.

#### **Request and response**

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4. On 12 February 2018, the complainant wrote to the trust and requested information in the following terms:

"I am applying under the FOI Act for the report mentioned in the link below. This is a report provided to a public body by another public body, and so it is in the public interest to publish the report in as full a form as possible. In order to overcome any concerns about identifying individual patients or staff I am happy to accept a report that redacts individual names and job titles.

<http://www.northdevonhealth.nhs.uk/about/reports/invited-review-royal-college-obstetricians-gynaecologists/>

5. The trust responded on 23 February 2018. It refused to disclose the requested information citing section 36(2)(b) and (c) of the FOIA.
6. The complainant requested an internal review on 10 April 2018.
7. The trust carried out an internal review and notified the complainant of its findings on 10 October 2018. It upheld its application of section 36(2)(b) and (c) of the FOIA.

## Scope of the case

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8. The complainant contacted the Commissioner on 5 March 2018 to complain about the way his request for information had been handled. The complainant confirmed that the withheld information is a report produced by RCOG into the North Devon Hospital's maternity unit. He believes there are strong grounds to release the report given the concerning evidence relating to patient safety in the unit and that this outweighs any public interest in the trust's need for safe space for internal critique and evaluation. The complainant drew the Commissioner's attention to a recent Care Quality Commission (CQC) report, which clearly states that there are ongoing concerns about patient safety despite previous recommendations:

<http://www.cqc.org.uk/news/releases/cqc-inspectors-call-improvements-northern-devon-healthcare-nhs-trust>

The complainant also stated that via information requests to maternity units across the UK he has identified that the unit has about three times higher than average number of low apgar cases (what the Commissioner understands to be the assessment of a baby's health after birth) and also three time more cases of moderate or severe Hypoxic Ischaemic Episodes (what the complainant described as "a more accurate measurement of brain damage done by paediatricians").

9. The Commissioner considers the scope of her investigation to be to determine whether the trust is entitled to withhold the said report in accordance with section 36(2)(b) or (c) and to determine where the public interest lies.

## Background

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10. In September 2017 the trust asked the RCOG to visit and provide independent support as part of a review of recent incidents in its maternity services. Following their visit, the RCOG made some recommendations which the trust followed immediately.

11. The trust said it received the full report from the RCOG (which is the withheld information in this case) in December 2017 and took the following actions in line with that report:

- Implemented changes to working rotas
- Increased medical cover in the unit
- Started recruiting to new posts
- Increased our focus on training and skills
- Made improvements to governance and incident review processes

12. The trust published an executive summary in the interests of being open and transparent. This can be accessed here:

<https://www.northdevonhealth.nhs.uk/wp-content/uploads/2018/02/RCOG-report-2017-executive-summary.pdf>

13. In October 2017 the CQC also inspected the trust and issued it with a warning notice under Section 29A of the Health and Social Care Act 2008. The warning notice set out areas of concern where significant improvement was required. The CQC published its report on 5 February 2018 and this can be accessed here:

[https://www.cqc.org.uk/sites/default/files/new\\_reports/AAAG9894.pdf](https://www.cqc.org.uk/sites/default/files/new_reports/AAAG9894.pdf)

14. Although this post dates the request, it is worth noting that a further CQC inspection took place on 17 and 18 July 2018. The CQC's report was published on 18 September 2018 and can be accessed here:

[https://www.cqc.org.uk/sites/default/files/new\\_reports/AAAH5733.pdf](https://www.cqc.org.uk/sites/default/files/new_reports/AAAH5733.pdf)

## Reasons for decision

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15. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, disclosure of the information –

(b) would, or would be likely to, prejudice–

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

(ii) the free and frank exchange of views for the purposes of deliberation, or

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

16. The trust confirmed that the qualified person for the purposes of section 36 of the FOIA received a copy of the request, a copy of the withheld information and the arguments for and against disclosure. Dr Alison Diamond, the Chief Executive of the trust authorised the use of section 36(2)(b) and (c) of the FOIA in this case on 23 February 2018. As Dr Diamond left the trust shortly afterwards, it obtained a further opinion from Ms Suzanne Tracey, the replacement Chief Executive, on 10 October 2018.
17. The Commissioner must first consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy herself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.
18. The trust confirmed that it is the qualified person's opinion that section 36(2)(b) and (c) apply to the withheld information. It stated that the trust must be allowed the safe space to review and examine its services, consider the recommendations made and decide on what action to take. It stated that it needs to be able to conduct rigorous and candid reviews of its services, seek advice and consider the pros and cons of various options without the risk of premature disclosure. If disclosure took place it would be likely to prejudice its ability to carry out free and frank discussions, obtain free and frank advice which would in turn be likely to prejudice its ability to plan and implement solutions.
19. The trust confirmed that if disclosure took place staff would be discouraged from participating in reviews and discussions in the future for the fear of public disclosure. It stated that they would be less inclined to assist, cooperate and provide their honest, free and frank opinions and information. This would be likely to prejudice the trust's ability to carry out such reviews and consider and implement the necessary actions that are required to improve patient care.
20. It also stated that maternity care and any incidents or issues with it are obviously highly emotive and sensitive matters. Disclosure could therefore cause those involved damage, distress and upset and even result in physical violence or harassment of staff.
21. The trust went on to say that disclosure would be likely to lead to reputational damage and attract local and national press. This would

then be likely to prejudice its ability to carry out its public affairs effectively. It also mentioned that disclosure would be likely to undermine the trust's willingness to invite external organisations to conduct reviews in the future.

22. The Commissioner is satisfied in this case that section 36(2)(b) of the FOIA is engaged. At the time of the request the trust was still considering the RCOG report and its recommendations. At this time it was still in the process of deliberation and discussing internally how best to address these recommendations and decide what actions to take. The Commissioner considers the qualified person's opinion that safe space was still required away from public disclosure to be a reasonable opinion to hold. She can see how the qualified person reached the opinion that disclosure would be likely to prejudice the ability of the trust to discuss and debate internally the issues it faces, the recommendations put forward and the options available to it.
23. The trust has also argued that disclosure at the time of the request would be likely to discourage staff from participating in such reviews in the future, including any further reviews and considerations that are required to address the current issues identified. If the report was disclosed they would be reluctant to participate so freely, frankly and honestly due to the fear of public disclosure. Again, the Commissioner accepts that this is a reasonable opinion to hold.

### **Public interest test**

24. The trust stated that it recognised the public interest in promoting accountability and transparency especially in respect of the decisions and actions it has taken. Additionally, it acknowledged the public interest in the expenditure of public funds and bringing to light information affecting public health and safety. It stated that disclosure would allow individuals and other organisations to understand decisions made by the trust, which clearly affect the lives of its patients. Disclosure would further public understanding and public debate surrounding the issues identified and the improvement that is required.
25. However, in this case the trust considers the public interest rests in maintaining the exemption. It stated that it needs to be able to conduct rigorous and candid reviews of its services, seek and obtain free and frank advice, considers the advantages and disadvantages of the options available without the fear of premature disclosure and public scrutiny. Disclosure at this time would be likely to prejudice its ability to plan and implement the necessary solutions, which is not in the interests of the wider public. It also said that it is not in the public interest to discourage staff from participating in such reviews in the future. It relies on the free and frank provision of opinions and information from its staff as a means

of identifying any issues and put steps in place to resolve them. It would not be in the wider interests of the public to prejudice this function.

26. The Commissioner considers the public interest test considerations under section 36 of the FOIA require her to consider the extent, severity and frequency of the inhibitions claimed by the public authority.
27. She considers there are strong and compelling arguments in favour of disclosure. It is clear that issues have been identified within the trust which will inevitably affect the quality of patient care and that when the CQC's report was published in January 2018 the trust was still rated as 'improvement required'. In a statement the CQC published its Chief Inspector of Hospitals said:

"It is disappointing to report that all four core services that we have inspected remain in need of improvement – and in some cases we have found the same concerns that we had raised during our inspections in 2014 and 2015."

It is understandable that such matters with attract public interest and be of concern to the patients it serves. Disclosure would enable the public to see exactly what is going on, what has been recommended and why and enable them to participate in the decision making that is ongoing. Disclosure would promote openness, transparency and accountability.

28. However, in this case despite the fact that she considers there are strong and compelling arguments in support of disclosure, the Commissioner considers the public interest is best served by maintaining the exemption. The Commissioner must consider the circumstances at the time of the request. The trust had only been in receipt of the RCOG report for two months. It had also just received the CQC's inspection report following their visit in the October. The trust was still in the process of considering the report(s) received and its options. In order to decide on the steps and resolutions required to address the recommendations made, the trust required the safe space to obtain and consider free and frank internal advice and deliberate openly, candidly and honestly on how to move forward. The Commissioner considers disclosure at this time would have been likely to prejudice this process and the free and frank exchange of advice and views. Those involved in this process would be likely to have been hindered or discouraged from discussing and considering the issues so openly and frankly and the trust would also have been directed to dealing with public enquiries and media attention. Considering the timing of the request and the circumstances at this time the Commissioner considers such consequences would have been fairly severe and frequent and this would not have been in the wider interests of the public. Rather it is in the interests of the public to allow the trust the safe space it requires to

considers its options and implement the right solutions in order to address the issues identified.

29. The Commissioner also accepts in this particular case that disclosure would be likely to discourage the staff that have participated from continuing to assist the trust. The RCOG report had only just been provided to the trust. The information that staff provided was therefore very much live and of relevance to the status of the trust at that time, their employment and the patient care they were able to provide at that time. Those that participated would be likely to be discouraged from helping further or the near future if there was the prospect of public disclosure at a time when matters are still very much current and under scrutiny. This would then hinder the trust's ability to carry out such reviews and implement the changes that are required.

### **Other matters**

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30. The Commissioner notes that the trust took six months to complete the internal review. The section 45 code of practice recommends that internal reviews are carried out within 20 working days of receipt. It is accepted that voluminous or complex requests may take longer but the internal review should not take any more than 40 working days in total. Six months is excessive and unsatisfactory. The Commissioner would therefore like to take this opportunity to remind the trust of the requirements of the code and ensure that appropriate measures are in place to enable it to complete future requests of internal reviews within the recommended timeframes.

## **Right of appeal**

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31. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

32. 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.
33. 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**

**Samantha Coward**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**