

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 June 2020

Public Authority: Betsi Cadwaladr University Health Board

Address: bcu.foi@wales.nhs.uk

Decision (including any steps ordered)

1. The complainant has requested various information in respect of the Robin Holden Report. Betsi Cadwaladr University Health Board responded to some of the complainant's questions but refused the report relying on section 21 and section 41 of the FOIA.
2. The Commissioner's decision is that Betsi Cadwaladr University Health Board was not entitled to rely on either section 21 or section 41 of the FOIA to withhold the requested information. The Commissioner has also recorded a breach of section 17(1) of the FOIA as it failed to respond within the timescales specified under section 10(1) of the FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose a full copy of the report with only the names of individuals subject to the grievances redacted.
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 8 May 2019, the complainant wrote to Betsi Cadwaladr University Health Board ('The Health Board') and requested the following information:

"I would be grateful for your help in accessing information from the Robin Holden Report of 17th January 2014, entitled: **Raising Staff Concern / Whistleblowing Policy – WP4 – Investigation Report – into the concerns raised about the "Management of the Mental Health Clinical Programme Group in their dealings with the Hergest Unit and a variety of other issues relating to the Hergest Unit"**.

I would also like information on follow-up action taken by the Board.

I have seen the summary of the Robin Holden Report that was made available to the Welsh Assembly Public Accounts Committee in November 2015 and I gather that the detailed report was withheld in order to protect patient confidentiality and the identity of the whistleblowers. However, my request does not require that kind of disclosure.

I would just like to know:-

- *The number of cases of neglect that are referred to in Recommendation 18 of the Report*
- *The nature of the instances of neglect noted as reported in Recommendation 18 of the Report (eg. Serious untoward incident, etc).*

*Recommendation 18 of the report's summary says: **The current arrangements for the care of frail elderly Patients needs to be urgently reconsidered. It is clearly unacceptable for the needs of frail vulnerable people to be neglected in the way that has been reported.***

I would also like to know what action was taken by the Board immediately on receipt of the Robin Holden Report in January 2014, in accordance with the requirements of section 6.6.2 of the Wales interim policy and procedures for the protection of vulnerable adults from abuse, which was in force at the time. Specifically, were the victims identified through the Robin Holden Report considered separately in individual Strategy Meetings and, if there were five or more such cases, were they recorded and dealt with as a large-scale investigation?

Could you please tell me what other actions were taken in compliance with this policy and procedures document, which says:-

6.6.2 Institutional abuse

Abuse can occur in institutions as a result of regimes, routines, practices and behaviours that occur in services that vulnerable

adults live in or use which violate their human rights. This may be part of a culture of a service to which staff are accustomed. Thus such practices may pass by unremarked upon by staff. They may be subtle, small and insignificant, yet together may amount to a service culture that denies, restricts or curtails the dignity, privacy, choice, independence or fulfilment of vulnerable adults. Individual victims, who may experienced significant harm, must separately be considered in individual Strategy Meetings. Five or more such cases in one setting should be recorded and dealt with as a large-scale investigation.

In addition, systemic and organisational concerns such as poor practice and low standards of care, whether or not they meet the threshold for adult protection, should be referred to and managed under Escalating Concerns guidance and Development and Corrective Action Plans to provider organisations which have institutional practices.

When a summary of the Robin Holden Report was made public in November 2015, a spokesperson for the Board said that action had been taken to address the report's recommendations, including a restructuring of the Board's management of mental health services. Could you please direct me to the reports made to the Board of the actions taken?

Finally, is it possible, please, for you to provide me with (or direct me to) a copy of the full Robin Holden Report, redacted only to the extent needed to protect patient confidentiality and the identity of the whistleblowers?"

6. The Health Board responded on 27 June 2019:

Items 1 and 2

The Health Board stated that there were no individual cases of neglect identified in the Holden Report, only generalised testimonies and it was not therefore possible to accurately identify the number of cases.

Item 3

The complainant was informed that it was not possible to answer this specific request as the individuals referenced in the Report had been done so in a way to protect their identity, adding that as it was an external report it was not possible for it to determine which individuals the report refers.

Item 4

The Health Board informed the complainant that the POVA process is Local Authority owned and led, suggesting he contact Gwynedd Local Authority, and providing the link to its website.

Item 5

The Health Board was unable to find any reference to 'reports made to the Board of the actions taken' in Board minutes for the last 12 months following the release of the summary report. It did however identify and attach a link to the Board papers of Board Meetings for 2014.

It also informed the complainant that a paper went to the Board on 23 January 2014 which refers to a report which would have been the Holden Report.

Further, general updates on the Hergest Unit (and wider mental health issues) went to the Board on 3 June and 29 July 2014. The Health Board further stated that the recommendations of the report were public as part of a previous FOIA request in 2015 and there were references to management structures within the action plan against the recommendations.

Item 6

The Health Board informed the complainant that it had previously considered a request for the Holden Report, and its subsequent response could be found on its internet site, adding that it was refusing this part of the request in reliance on section 21 of the FOIA (Information accessible by other means). It further informed the complainant that it remains of the view that the exemption cited in its previous response remained current and relevant.

7. The response in question confirmed that the Health Board was relying on section 41, (information provided in confidence) to refuse to provide a copy of the requested Robin Holden report.
8. Following an internal review, the Health Board partially overturned its original decision providing a redacted version of the Summary and Recommendations, but withholding the remainder of the report under section 41, on the basis that individual witnesses would have had an expectation that their statements provided as part of the whistleblowing investigation would be kept in strict confidence and to release this information may constitute and actionable breach of confidence.
9. The Health Board also provided a copy of the action plan which summarised the action taken to date in response to the

recommendations and provided some background and context to the report.

10. The complainant contacted the Health Board on 4 July 2019 expressing dissatisfaction with its reliance on section 41 of the FOIA. He also asked follow on questions based on its previous response which are the subject of a separate and ongoing investigation by the Commissioner.
11. The Health Board responded on 6 August 2019, again providing the links to its previous internal review and attachments and confirmed that it holds no further information relating to the Robin Holden Report which it could supply, adding that it will not be able to process any further requests relating to this subject.
12. Various correspondence continued between both parties in respect of the complainant's follow on request, and on 26 September 2019, the complainant contacted the Health Board stating that it had not addressed his concerns about its reliance on section 41 for a copy of the Report.
13. The Health Board responded on 11 October 2019 confirming that it considered it had now exhausted its local internal resolution stages.

Scope of the case

14. The complainant contacted the Commissioner on 13 October 2019 to complain about the way his request for information had been handled. He was not satisfied with the Health Board's procedural handling of his request and considered its reliance on section 41 of the FOIA to withhold the Robin Holden Report was inappropriate.
15. The Commissioner considers that the scope of her investigation is to determine whether the Health Board was entitled to rely on section 21 and in turn, section 41 of the FOIA to refuse this request.

Reasons for decision

Section 21 – Information accessible to the applicant by other means

16. Section 21 of the FOIA provides an exemption to information which is reasonably accessible to the applicant otherwise than under section 1 of the FOIA. The purpose of the section 21 exemption is to ensure that there is no right of access to information via FOIA if it is available to the applicant by another route. Therefore, unlike most exemptions, the circumstances of the applicant can be taken into consideration.

17. Although the information may be available elsewhere, a public authority will need to consider whether it is actually 'reasonably accessible' to the applicant before it can apply section 21. Defining 'reasonably accessible' is open to interpretation, however it generally applies to the following:
 - Information available via the public authority's publication scheme will be reasonably accessible to an applicant.
 - There is another existing, clear mechanism by which the particular applicant can reasonably access the information outside of FOIA. For example, under the Access to Health Records Act 1990.
18. Section 21 is an absolute exemption which means that where the exemption is engaged, a consideration of the public interest test is not necessary.
19. The Commissioner has considered the status of the Robin Holden report and notes that it was not accessible via the Health Board's publication scheme or via any other mechanism by which the applicant could reasonably obtain access outside of the FOIA. The Health Board was not therefore entitled to rely on section 21 in respect of the report. The Commissioner would also like to take this opportunity to clarify that citing section 21 in relation to information that has been refused on the basis of another exemption is a wholly inappropriate use of the exemption.

Section 41 – Information provided in confidence

20. Section 41(1) of the FOIA states that:

Information is exempt information if –

- (a) It was obtained by the public authority from any other person (including another public authority), and*
 - (b) The disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person"*
21. Section 41 is an absolute exemption, therefore is not subject to the public interest under the FOIA.
 22. In this case, the disputed information is a full copy of the Robin Holden Report. The Health Board has confirmed that the full report was based on the whistleblowing testimonies of individual staff members based

within two wards within the Mental Health unit of the West area of the Health Board, and considers the information was therefore obtained from third parties.

23. The Commissioner is satisfied that the information was obtained from a third party.
24. In her analysis of whether disclosure of the information would constitute an actionable breach of confidence the Commissioner must consider:
 - whether the information has the necessary quality of confidence;
 - whether the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information and to the detriment of the confider.
25. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial.
26. In this case, the Health Board has stated that the information was provided by these staff members in accordance with the All Wales Procedure for staff raising concerns. The Health Board added that one of the key aims of the procedure is to encourage staff to report more serious concerns and suspected wrongdoing as soon as possible, in the knowledge that their concerns will be taken seriously and investigated as appropriate, and that their confidentiality will be respected.
27. The Health Board further informed the Commissioner that in this instance, the staff members provided very candid information on the basis that it would be treated confidentially, and that there would be no detrimental effect to their employment or to their relationship with colleagues, as there was not only a risk that they could be identified, but also that the individuals they had whistle blown about could be identified. This would have risked completely undermining any progress and remedial actions going forward.
28. Based on the above, the Commissioner is satisfied that there was an explicit obligation of confidence to the staff members whose testimonies the report was based on.
29. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial.

30. The Commissioner has seen no evidence that the full and unredacted report has been put in the public domain and is therefore satisfied that the information is not accessible by other means.
31. The Commissioner also notes that the subject matter and content of the information in question would not be considered trivial to those who provided testimonies which went into the formulation of the report.
32. The Commissioner is therefore satisfied that the withheld information has the necessary quality of confidence and has therefore gone on to consider whether disclosure of the information would be to the detriment of the confider.
33. The Commissioner is mindful of the Tribunal's decision in the case of *Bluck v ICO & Epsom and St Helier University Hospital NGHS Trust [EA/2006/0090] paragraph 15* that the loss of privacy can be a detriment in its own right. There is no need therefore for there to be any detriment to the confider in terms of tangible loss in order for it to be protected by the law of confidence other than the loss of privacy in its own right.
34. Having considered the withheld information, the Commissioner notes that the report does not contain any specific testimonies of witness statements or names of the individual witnesses. She would also point out that the witness statements themselves, which formed the basis of the report were not part of the request.
35. It is also clear from the report that the witnesses were very concerned about patient care and the fact that the general concerns described in the report, combined with the fact that they were prepared to act as witnesses, indicates that they wanted something done about those concerns. The Commissioner is also mindful that the witness statements were provided in 2013, some 6 years prior to the request, when their individual employment situations may have changed considerably from those at the time of their testimonies. With the exception of the names of those the grievances were submitted about, the Commissioner has therefore failed to identify any detriment to the confiders.
36. However, in case she is wrong in this judgement she has gone on to consider whether it would be possible to bring an actionable breach of confidence should the information be disclosed.
37. Although section 41 is an absolute exemption meaning that there is no requirement to consider the public interest test, within the Common Law of Confidence, there is a defence to an action for a breach of confidence, if it can be demonstrated there was an over-riding public interest defence. The Commissioner has therefore gone on to consider whether

this is possible, and if so, if there is such an overriding public interest defence for a breach of confidence.

38. As outlined in paragraph 34 of this notice, the Commissioner does not consider it possible to identify the witnesses from the report as its contents have been reported in a generic manner. She therefore considers it highly unlikely that an actionable breach of confidence against the Health Board would be possible. The only exception to this is if the names of those who were the subject of the grievances were disclosed. However, since the Commissioner is satisfied that these names should be redacted, this would not be possible.
39. Nevertheless, in the event that Commissioner was proved to be wrong in her above assessment, the Commissioner acknowledges the need to protect the relationship of trust between the confider and the confident; and the need not to discourage or otherwise hamper a degree of public certainty that such confidences will be respected by a public authority.
40. However, she also acknowledges that there is a strong public interest in the disclosure of the information as it indicates that there was a very serious and concerning situation on two of the wards at the Hergest Unit responsible for the care of vulnerable adults.
41. Additionally, there were wider concerns regarding the quality and safety of care provided to mental health patients in other areas falling within the Health Board's responsibility including the Tawel Fan ward, (an older people's mental health ward in the Ablett Unit of Ysbyty Glan Clwyd in Bodelwyddan, suggesting that the concerns identified in the Holden Report were more widespread.
42. In January 2014 the Health Board commissioned an independent external reviewer, Donna Ockenden to look at patient care on the Tawel Fan ward, and her report, finalised in September 2014 and published in May 2015 attracted intense media interest. The report itself was based on information from 40 members of staff and 15 family members, and concluded that there was a culture on the ward which resulted in institutional abuse (as defined by section 6.6.2 of the Wales interim policy and procedures for the protection of vulnerable adults (POVA) and described in the complainant's request.
43. In June 2015 the Health Board was placed in Special Measures by the Welsh Government with mental health services identified as one of the areas requiring significant improvement, again suggesting that the concerns in relation to the care of vulnerable adults in the Holden Report were more widespread within the Health Board's area of responsibility than the report in isolation.

44. Further, the Commissioner is mindful that the Ockenden report, based on the testimonies of 40 members of staff and 15 family members was in fact published and contains perhaps more detail than that provided in the Holden Report, but as far as she is aware, did not result in claims pursued for breach of confidence.
45. In weighing the above against the public interest in keeping the information confidential, the Commissioner has concluded that there is an overriding public interest defence for a breach of confidence, and that the Health Board was not entitled to rely on section 41 in respect of the withheld information.

Section 17 – refusal of the request

46. Section 17 of the FOIA concerns the refusal of the request and section 17(1) states that:

"A public authority which, in relation to any request for information, is to any extent relying on a claim ... that information is exempt information must, within the time for complying with section 1(1) give the applicant a notice..."

47. The Commissioner notes that the complainant submitted his request on 8 May 2019 and did not receive a response until 27 June 2019. The Health Board therefore breached section 17(1) of the FOIA in its handling of this request for information.

Right of appeal

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

49. 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.

50. 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

**Catherine Dickenson
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