

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 August 2020

Public Authority: The Tavistock and Portman NHS Foundation Trust

Address: 120 Belsize Lane
London
NW3 5BA

Decision (including any steps ordered)

1. The complainant has requested from the The Tavistock and Portman NHS Foundation Trust (the "Trust") a report by Dr David Taylor from 2005. The Trust refused to provide the information, citing the exemptions at sections 36, 31 and 38 but later withdrew its reliance on section 31.
2. The Commissioner's decision is that section 38 is not engaged in relation to this information. She finds that section 36 is engaged but that the public interest favours the release of the requested information. The Trust also failed to respond to the request within 20 working days and breached section 10(1).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - With reference to the highlighted copy provided by the Trust, release the requested report with the exception of the following lines containing personal data –

The highlighted parts of the last three lines on page 9;

The highlighted parts of the first 7 lines on page 10;

The highlighted part of line 9 on page 10.

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.

Background

5. The request is for a report which was an internal review of the then Gender Identity Dysphoria Unit ("GIDU") at the Trust, dated January 2006, by Dr David Taylor who was the Trust's previous Medical Director. The report is a review of GIDU which took place in 2005. However, the Trust explains its current form as follows -

"The service is now called the Gender Identity Development Service ('GIDS') and is one of the Trust's specialist services, commissioned by NHS England to provide psychological assessment and treatment to children and young people experiencing gender dysphoria."

GIDS has recently received significant media attention, stemming from the unauthorised release of a 2019 investigative review to various national newspapers and broadcasters, BBC Newsnight broadcasts, and a recent (and ongoing) judicial review in relation to the service."

Request and response

6. On 23 May 2019 the complainant made the following request for information under the FOIA:

"I am sending this request under the Freedom of Information Act to ask for the following information:

1) I would like a copy of the 2005 report of the review led by psychiatrist Dr David Taylor that looked into concerns about the speed at which young people receiving care at the GIDS were being referred to endocrinology services for the commencement of puberty blocking drugs.

2) I would also like copies of the minutes of all meetings attended by Dr Taylor and staff at GIDS in 2005 on this topic and to do with this review/report.

3) If the report itself is unavailable I would like all documents from 2005

that relate to the report and any documents that record the key findings of the report.

If you need any further information from me in order to deal with my request, please call me on [phone number].

If you are encountering practical difficulties with complying with this request, please contact me as soon as possible (in line with your section 16 duty to advise and assist requesters) so that we can discuss the matter and if necessary I can modify the request.

If it is necessary for any reason to redact any information, please redact the minimum necessary and send me the rest of the material, explaining the legal grounds for each redaction."

7. The Trust responded on 4 July 2019 and stated that it did not hold some of the requested information (parts two and three of the request) but confirmed that the remainder was held (part one). However, the Trust refused to provide part one, citing the following – section 36 – prejudice to the effective conduct of public affairs.
8. The complainant requested a review on 24 July 2019 about the withholding of the information he had requested at part one of his request – the 2005 report.
9. The Trust provided an internal review on 2 October 2019 in which it maintained its original position that the information relating to part one should be withheld. It cited sections 36 and added sections 31 (law enforcement) and 38 (health and safety) as its reasons for refusing to provide the information.
10. After the Commissioner had begun her investigation the Trust confirmed that it was continuing to rely on section 36(2)(c) but that it no longer considered section 31 to be applicable. Additionally, it cited section 38(1)(b) rather than section 38(1)(a). The Trust provided a copy of the report with highlighted sections and explained to the Commissioner that it now considered that some limited information could have been provided. However, the majority of the report should be withheld. In the same correspondence the Trust accepted that it had not provided any public interest arguments in its refusal notice which was clearly an error.

Scope of the case

11. The complainant contacted the Commissioner on 11 October 2019 to complain about the way his request for information had been handled. His view is that the report is an extremely important document that deals with concerns about the health of young people and that there is a clear public interest in releasing it.
12. The Commissioner considers that the scope of this case concerns the appropriateness of the Trust's citing of section 36(c) and section 38(1)(b). She will also look at whether there were any procedural breaches.

Reasons for decision

Section 38 – Health and safety

13. Section 38(1) of the FOIA states that:

'Information is exempt information if its disclosure under this Act would, or would be likely to-
(a) endanger the physical or mental health of any individual, or
(b) endanger the safety of any individual.'

14. The Trust has applied this exemption to the whole of the report, apart from the limited information that it is willing to release. The Trust explained that it had altered its view on which part of section 38 was engaged because it related to the physical safety and protection of its staff.
15. The Commissioner's published guidance on section 38¹ states that the use of the term 'endanger' can be interpreted as having the same meaning as 'prejudice'. In [PETA v IC & University of Oxford EA/2009/0076 \(13 April 2010\)](#) the Tribunal had said, "All parties agreed that in the context of section 38 'endangering' and 'prejudicing' came to the same thing and that consequently the Tribunal could read across the existing body of case law".
16. The Tribunal in [Lownie²](#) diverged from this opinion. During the course of its deliberations it rejected the Commissioner's approach, preferring the

¹ <https://ico.org.uk/media/for-organisations/documents/1624339/health-and-safety-section-38-foia.pdf>

² [Andrew Lownie v the Information Commissioner and The National Archives and The Foreign and Commonwealth Office EA/2017/0087 \(12 July 2018\)](#)

view expressed in the [British Union for the Abolition of Vivisection V IC and Newcastle University, EA/2010/0064 \(11 November 2011\)](#) where it was stated that Parliament had chosen to use the word "endanger" and did not refer either to "injury" or to "prejudice" –

"We note that the assimilation of 'endanger' to 'prejudice' in PETA was not a reasoned conclusion but was based on agreement between the three parties involved in that case. The 'prejudice' test is expressly included in a number of FOIA exemptions. In our view, if Parliament had intended s.38 to depend upon the same test as those other exemptions, it would have used the same language. It did not, but instead chose to use different language in s.38. We should follow the Parliamentary intention. In our view, attempting to assimilate the two tests merely muddies the waters. For the purposes of s.38 we must apply the words of s.38, not the words of different exemptions."

17. In order to engage this exemption a public authority must demonstrate that there is a causal link between the endangerment and disclosure of the information. It must also show that disclosure would or would be likely to endanger the safety of any individual. The effect cannot be trivial or insignificant. Endangering safety is usually connected to the risk of accident and the protection of individuals.
18. As stated earlier in this decision notice, the Trust's view is that the physical safety and protection of its staff are at stake and that in the light of other requests for information where the Trust may be forced to disclose the names of individuals and the fact that information about its staff is already in the public domain.
19. The Trust has suggested that this "could" affect its staff in the manner indicated, therefore suggesting the lower level of prejudice.
20. The Commissioner's view is that some people or groups of society are particularly vulnerable and their safety may be more easily endangered than that of others. For example information about individuals involved in controversial work. There is no doubt that GIDS is controversial and there has been a great deal of recent media attention. The Trust has set out its evidence for citing section 38 under its public interest test. The administration team has received threatening phone calls, following each media story. Clinical members of staff have received threatening and abusive attacks via social media. The staff at the Trust has also received death threats via social media and it gives the example of a Twitter account being disabled for that reason. A clinical consultation resulted in a member of staff being attacked following adverse media coverage.
21. There is no doubt that the work carried out by GIDS garners both traditional and social media interest. Working in the field of mental

health carries with it an increased risk of danger and the work of GIDS is controversial. The examples the Trust gives above are clearly concerning. However, this area of medicine has attracted and will attract publicity. The Commissioner does not accept that the Trust has demonstrated the causal link between the release of this particular information which was written many years ago and is a report about GIDU rather than GIDS and any likely endangerment beyond that which is intrinsic to working in this field. The exemption is not engaged.

Section 36 – prejudice to the effective conduct of public affairs

22. Section 36 FOIA 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-

(2)(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,

or (2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

23. The Commissioner has had sight of the report to which section 36(2)(c) has been applied. The Trust has stated that it does not consider the entire report to fall under the scope of this exemption but the passages it is willing to release (but has not yet done so) are very limited.

24. The Commissioner is required to consider the qualified person’s opinion as well as the reasoning which informed that opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:

- Establish that an opinion was given;
- Ascertain who was the qualified person or persons;
- Ascertain when the opinion was given; and
- Consider whether the opinion was reasonable.

25. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. The qualified person in respect of the Trust is the Chief Executive, Paul Jenkins. The Commissioner is satisfied that the Chief Executive who gave his opinion was the appropriate qualified person. The opinion of the qualified person was provided on 7 June 2019 in a brief three sentence email confirming that the outcome of what appears to have been a verbal discussion was that

the information should be withheld at that stage. The Trust has confirmed that there was no formal documentation made at that time.

26. The Trust, however, confirmed that the Chief Executive has had sight of the full report and that he comprehensively reviewed its contents. Discussions took place to weigh the public interest arguments for and against disclosure but they were not formally documented, though they have been provided retrospectively. The Trust's response explained to the Commissioner that enquiries had been made of those in the Trust's employ at the time and verbal assurances made from the relevant senior officers about the circumstances at the time.
27. The Trust has stated that the prejudice both "would" and "would be likely" to occur if the requested information was disclosed. For that reason the Commissioner has taken the lower threshold – "would be likely" rather than the stronger evidential burden needed for "would".
28. Although it would have been preferable for a formal record to have been established at the time of the request, the Commissioner has no reason to doubt the Trust's account of events.
29. The Commissioner next needs to establish whether the qualified person's opinion was reasonable.

Is the qualified person's opinion reasonable?

30. The qualified person in relation to the exemption at section 36(2)(c) must give an opinion that the release of the requested information would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
31. The Commissioner's guidance³ regarding the definition of "reasonable" is as follows:

"In this context an opinion either is or is not reasonable. In deciding whether an opinion is reasonable the ICO will consider the plain meaning of that word, rather than defining it in terms derived from other areas of law...The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is: "in accordance with reason; not irrational or absurd". If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable

³ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

person could hold – then it is reasonable.”

32. In order to determine whether section 36(2)(c) is engaged the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered the following factors -
- Whether the prejudice relates to the specific subsection that has been cited, in this case 36(2)(c). If the prejudice or inhibition is not related to the specific subsection the opinion is unlikely to be reasonable.
 - The nature of the information and the timing of the request.
 - The qualified person's knowledge of, or involvement in, the issue.
33. Prejudice to the effective conduct of public affairs could refer to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose, but the effect does not have to be on the authority in question; it could be an effect on other bodies or the wider public sector. It may refer to the disruptive effects of disclosure, for example the diversion of resources in managing the effect of disclosure.
34. The Trust explains that patients have reported distress regarding media attention and have questioned the care and treatment delivered by GIDS. The Trust provides other mental health services to vulnerable children and young people who have expressed concern about the quality of care that the organisation offers during attendance at clinical assessment and treatment centres.
35. Although the requested information is historical, it related to concerns regarding GIDS. Some aspects of the care and treatment discussed in the report (such as medication) are still relevant and are being offered today.
36. The Trust contends that disclosure of the report would exacerbate these issues, Specifically the concerns raised by patients regarding their care and treatment. This is likely to affect their access to the service or make them reluctant to access Trust services. This would therefore be likely to affect the Trust's ability to provide safe and effective healthcare to the detriment of patients. The Trust points out to the Commissioner that it has received anxious phone calls from members of the public regarding the way in which the drug mentioned in the report is prescribed.
37. The public authority further argues that, even where service delivery has changed from that detailed in the report, disclosure would or would be likely to impact on the Trust's ability to deliver safe and effective

healthcare and ensure public confidence in its services. The Trust's view is that some elements of the report do not present an accurate representation of the services delivered in the present day. However, it acknowledges that some aspects of care and treatment are still relevant. Disclosure would call into question its methods of care and treatment and raise concerns about whether they reflect current practice.

38. The Trust has considered releasing the requested information with contextual material by way of mitigation. Given the ongoing debate in relation to the services and the public and media attention, the Trust does not consider that this would be possible in light of its experience in accounting for what it sees as previous misrepresentations by the media.
39. The Commissioner accepts that the qualified person's opinion that patients may be reluctant to access the Trust's services and that dealing with public and media attention is a diversion of resources. The opinion is a reasonable one to hold. The exemption is engaged.

Public interest test

40. The Commissioner needs to consider, however, whether the public interest in withholding the requested information outweighs that in disclosing it.

Public interest factors in favour of maintaining the exemption

41. The Trust argues that disclosure could raise unjustified concerns amongst the families who access GIDS or those on the waiting list.
42. It suggests that the timing of the request is relevant since GIDS is currently a matter of intense media scrutiny. There is a Judicial Review concerning GIDS and disclosure could lead to media coverage that could potentially influence the outcome of the review.
43. The Trust explains that the report contains historic information about the types of medications prescribed and the guidelines at that time for their application. As these guidelines have changed, disclosure could lead to unfounded concerns about current treatments and lead to a surge in enquiries from service users. The Trust says it welcomes such engagement but that it puts pressure on resources and impacts on the time which service users must wait for a first appointment.
44. Because of the intense media scrutiny it contends that disclosure could increase prejudice towards this service user group which could impact on their accessing services. The Trust has a statutory duty to provide care services in a way that achieves the trust and confidence of the population that are referred to it and its aim is to protect their health,

safety and wellbeing. The service users are children and young people who often present in a state of distress or with mental health problems. Providing inaccurate and out-of-date information could cause unnecessary distress to the user group and adversely impact on the Trust's ability to provide effective and safe services to its patients.

Public interest factors in favour of disclosing the requested information

45. The Trust stated that it understood that there is a public interest in the area of gender dysphoria. Disclosure of the report would provide some transparency about historical clinical practice and may be of historical value. It would enable the public to make a reasonable comparison of service provision at the time and current services.
46. In his request for a review the complainant pointed out to the Trust that it could hardly withhold the entirety of the report due to section 36 alone and stressed that this is an extremely important document that deals with concerns about the health of young people, with a clear public interest in releasing it.
47. The complainant disputes the view of the Trust that the information in the report would be misconstrued by the public as being relevant to current *"thought and service delivery in this area"*. He does not accept that the report should be withheld because it will be misunderstood by the public or deliberately misrepresented by the media. The complainant suggests that the Trust could provide contextual information to explain any differences in medical practice between the time the report was produced and today. He questions the Trust's view that it is not possible to contextualise due to the *"febrile nature"* of the ongoing debate around these services which he contends is purely subjective and lacking in evidence.
48. Although he sympathises with the arguments made about concerned parents and patients his opinion is that any out-of-date medical or practical information in the report could be explained by the Trust and should not be used to block the whole report from being released. The complainant states that the fact that the issue is subject to much attention surely goes both ways. The report and the services to which it refers are to do with the long term health and well-being, both mentally and physically of hundreds of young people. He suggests that it is extremely important that as many facts and opinions from medical practitioners and those who provide these services be made public to better inform the debate on what is an often misunderstood subject.
49. His view is that the public interest clearly lies in disclosure whether it is section 36 or 38 that has been cited and that the argument put forward

by the Trust that disclosure could adversely affect it and its ability to provide effective and safe services to its patients is unsatisfactory.

Balance of the public interest

50. The Trust has highlighted its reasons for not releasing this information. It argues that it is inaccurate and out-of-date, may influence the judicial review taking place, that it places pressure on resources and may raise unjustified concerns from patients. The Commissioner notes that the report was over thirteen years old when it was requested. She has considered the differing viewpoints of the complainant and the Trust as to what is in the public interest. She accepts that a great deal of media attention is distracting but this is a controversial field which inevitably raises such attention. She also accepts that information within the report may not reflect current practice but it is not purely of academic or historical interest. The Trust has stated that some aspects of care and treatment contained in the report are still relevant.
51. There is much public and media interest in this area of medicine. That in itself would not be a reason to release the information and, as it concerns the mental health of children/young people, this factor could weigh against disclosure. On balance though it is also important that those directly affected by these issues, either because they have been patients, the parents of patients, or prospective patients should be able to see this information and the extent or otherwise that current practices have emerged from it. The Commissioner agrees with the complainant that it should be possible for the Trust to provide contextual information, if deemed necessary.

Section 10 – time for compliance

52. Section 10(1) states that:

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 1(1) provides that:

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

53. The request was made on 23 May 2019. The Trust did not respond until 4 July 2019 and therefore breached section 10(1) in failing to respond within 20 working days.

Other matters

54. There was a delay in the Trust completing the internal review which went well beyond the maximum 40 working days recommended.

Right of appeal

55. 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

56. 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.
57. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF