

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 November 2023

Public Authority: North West Anglia NHS Foundation Trust
Peterborough City Hospital
Bretton Gate
Castor
PE3 9GZ

Decision (including any steps ordered)

1. The complainant has requested copies of any reviews undertaken by an external consultant on behalf of North West Anglia NHS Foundation Trust (the Trust). The Trust identified one report in scope of the request but considered it exempt under section 41 of FOIA – that the information was provided in confidence.
2. The Commissioner's decision is that the Trust has failed to demonstrate the section 41 exemption is engaged.
3. The Commissioner requires the Trust to take the following steps to ensure compliance with the legislation.
 - Disclose the information in scope of the request – the document entitled "Leadership and Culture".
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 13 April 2023, the complainant wrote to the Trust and requested information in the following terms:

“In your public Trust board papers from 11 April 2023 there is a 12-page document entitled “Leadership and Culture Gap Analysis”.

This said “an External consultant with strong people and OD experience has undertaken the review”.

Please provide a copy of every review this external consultant has undertaken concerning North West Anglia NHS Foundation Trust since 1 January 2022.”

6. The Trust responded on 16 May 2023. It stated it was applying section 43(2) and 41 to refuse the request.
7. Following an internal review the Trust responded again on 13 July 2023 and acknowledged section 43(2) had been incorrectly applied but maintained section 41 was still applicable and provided a basis for refusing the request.

Scope of the case

8. The complainant contacted the Commissioner on 18 July 2023 to complain about the way their request for information had been handled.
9. The Commissioner considers that the scope of his investigation is to determine if the Trust has correctly applied the provisions of section 41 to withhold the requested information.

Reasons for decision

Section 41 – information provided in confidence

10. Section 41(1) of FOIA states that information will be exempt if:
- it was obtained by the authority by any other person;
 - its disclosure would constitute an actionable breach of confidence;
 - a legal person could bring a court action for that breach of confidence; and
 - the court action would be likely to succeed.

Was the information obtained from any other person?

11. Section 41(1)(a) states that the information must have been obtained from "any other person".
12. The information in this case is a report by an external consultant, commissioned by the Trust, into leadership development and improvement at the Trust. The report was titled "Leadership and Culture: Needs Analysis Recommendations" and was formulated by seeking the views of selected stakeholders and reviewing strategies and people data. The report contains a brief overview of stakeholder feedback and recurring themes and recommendations by the external consultant.
13. The Commissioner accepts this is information obtained from another person. He must now consider whether or not its disclosure to the public would constitute a breach of confidence 'actionable' by that or any other person. 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.

Does the information have the necessary quality of confidence?

14. In order for information to have the necessary quality of confidence, it must be more than trivial and not otherwise accessible.
15. The Trust states the information in the report is not widely known. A summary was provided at a public board meeting but the information in the report is not publicly available.
16. As such the Commissioner accepts the information has the necessary quality of confidence in that it wasn't more widely known and was not trivial.

Was the information imparted in circumstances importing an obligation of confidence?

17. In its internal review response the Trust argued that the information was provided in circumstances that would infer an obligation of confidence.
18. The Trust stated they could not confirm that the report was commissioned as a confidential report, but it understood the focus group attendees would have been under the impression the information they provided would be considered confidential.

19. The author of the report confirmed that there was nothing specifically in writing around confidentiality of the focus groups, but stakeholders would have been informed that only key themes would be reported to maintain anonymity.
20. The Commissioner notes the report itself is not marked as confidential and it was commissioned by the Trust. The Commissioner is therefore sceptical that it was imparted to the Trust by the consultant with any obligation of confidence as once it has been written and submitted it is for the Trust to determine its use and audience.
21. In terms of the staff/stakeholders who were involved in any focus groups; the Commissioner notes that the only certainty in terms of what participants were told, is that they were informed only key themes would be reported to maintain anonymity.
22. The Commissioner has viewed the withheld information and notes large portions of the report are made up of the consultant's advice, summaries and recommendations. The short sections that do detail themes that came out of the focus groups are very broad and anonymised and not directly attributable to individuals and there are other scattered sentences referring to stakeholder views.
23. The Commissioner accepts there was some implied obligation of confidence to the participants and where the report contains sections that are derived from comments made in the focus groups this part of the test has been met. However, in relation to the majority of the report the Commissioner is not convinced the recommendations, advice and summaries were sent in circumstances importing an obligation of confidence as they are not intrinsically linked to the information derived from the stakeholders.

Would disclosure be detrimental to the confider?

24. The Trust has not put forward any explicit case for detriment but considers there could be detriment to the stakeholders who participated in the focus groups should the report be disclosed.
25. The Commissioner does not think this is a compelling argument as participants were informed that key themes would be reported and, having viewed the report, views from the focus groups are presented in sections titled 'Stakeholder themes' and 'Key themes'. Comments are not quoted verbatim and only broad statements are made that are not attributable to named individuals.
26. Participants did provide their comments in the focus groups in circumstances importing an implied obligation of confidence, but they were aware that key themes would be included in the report and that

this report would be sent to the senior leadership team that commissioned the report.

27. If there was likely to be any detriment to the confiders the Commissioner considers this would have occurred at the point the report was sent to the Trust and only if it was possible to attribute any of the 'themes' to identifiable individuals. As the Trust has not suggested this is the case the Commissioner does not consider that disclosure of the report more widely ie to the general public would lead to any detriment to the confiders.
28. In any event, the Trust would likely have a public interest defence for any breach of confidence - case law on the common law of confidence suggests that a breach of confidence won't succeed, and therefore won't be actionable, in circumstances where a public authority can rely on a public interest defence. The Trust has not detailed any public interest in maintaining the exemption beyond simply asserting the public interest lies in this. The complainant however has provided arguments relating to transparency, openness and scrutiny. Pointing to the size of the Trust and the number of people it serves and the recent change in Chief Executive as reasons why it is in the public interest to see a report that addresses the leadership culture at the Trust.
29. On this basis the Commissioner does not find that the Trust has correctly engaged the section 41 exemption to withhold the report and he now requires the Trust to disclose this.

Right of appeal

30. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

31. 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.

32. 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
Senior Case Officer
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