

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 March 2024

Public Authority: Kent Community Health NHS Foundation Trust
Address: The Oast, Unit D
Hermitage Lane, Barming
Maidston
Kent ME16 9NT

Decision (including any steps ordered)

1. The Commissioner's decision is that the Kent Community Health NHS Foundation Trust ('the Trust') correctly applied section 43(2) of FOIA to the request for an autism assessment report template. This exemption concerns commercial interests.
2. It's not necessary for the Trust to take any corrective steps.

Request and response

3. The complainant submitted the following information request to the Trust on 5 July 2023:

"Please could you send me Psicon's autism assessment report template that was in force on the 11th April 2023 and also their most current."
4. The Trust responded on 24 July 2023 – its reference FOI 122. It refused the request under section 43(2) of FOIA.
5. The complainant requested an internal review on the same day.
6. In its internal review of 22 August 2023, the Trust confirmed it held the requested information but maintained its position that it was exempt under section 43(2) of FOIA. At this point the Trust also applied section

36 of FOIA to the information, which concerns prejudice to the effective conduct of public affairs. Finally, the Trust explained changes that had subsequently been made to the template in question.

7. The Trust provided a further internal review on 5 December 2023. It restated its position and it also noted that in further correspondence it had received from the complainant on 4, 5 and 6 October 2023, they hadn't raised any further concerns about its response. The Trust said it therefore considered this request to have been addressed in full and it was now closed.
8. In their initial complaint to the Commissioner of 18 January 2024, the complainant said that they had received a draft report associated with the template through another route. As a result, they're no longer convinced by the arguments the Trust has given for withholding the requested information. The complainant considers the Trust could have redacted some material and disclosed the rest.
9. In two further items of correspondence that they sent to the Commissioner dated 21 February 2024, the complainant detailed at length what they consider to be 'Outstanding Items' and 'General Concerns' associated with the complaints they've submitted to the Commissioner about the Trust's handling of their requests, of which there are a number. The Commissioner has taken account of the complainant's reference to the current request in those documents.

Reasons for decision

10. In the first instance, this reasoning will focus on whether the Trust is entitled to rely on section 43(2) of FOIA to withhold the requested information. If necessary, the Commissioner will also consider the Trust's reliance on section 36.
11. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
12. The Trust explained to the complainant that disclosing the information they've requested would be likely to prejudice its own commercial interests and those of the provider of the service in question.
13. This is because, it said, sharing this clinical template within the public domain could "influence future completion of referrals, screening tool completion and result in inaccurate clinical information being provided." The Commissioner understands the Trust to mean here that releasing the template(s) or redacted versions of them would be likely to affect

the behaviour of individuals during an assessment, as individuals would have an insight into the observations that clinicians are looking for in clinic. This could aid someone who was malingering and cause harm to that person or the wider public. If that's correct, the Commissioner considers that this is a less compelling section 43 argument but one that sits more comfortably under section 36(2)(c) of FOIA.

14. In its internal review of 22 August 2023, the Trust advised that the template(s) - and redacted versions of them - are Psicon Ltd's intellectual property and it has a right to protect its intellectual property.
15. The Trust said that releasing the templates or a redacted version of them into the public domain would be likely to allow Psicon Ltd's competitors to use the template(s) to inform their own assessment reports. It said that when it was deciding what information can or can't be released, the Trust had to consider what other information has previously been released into the public domain. It noted it had recently received various requests relating to Psicon Ltd's contractual arrangements with the Trust and the service it provides on the Trust's behalf. Previously released information together with Psicon Ltd's templates would be likely to harm Psicon Ltd's commercial success in bidding for NHS contracts, either due to plagiarism of its product by competitors, or by giving competitors an advantage by seeing Psicon Ltd's intellectual property in a raw state not intended for public consumption.
16. Finally, the Trust said that disclosing the information would be likely to have financial implications for the Trust, should Psicon Ltd or other trusts that commission Psicon Ltd decide to take legal action. This would result in public funds being used to deal with litigation or compensation.
17. The Commissioner is satisfied first, that the harm the Trust envisages relates to commercial interests; its own and Psicon Ltd's. Second, the Commissioner has considered the prejudice envisioned by disclosure and how that would be caused. Regarding the Trust's arguments at paragraphs 13 and 16, the Commissioner is less persuaded that disclosure would be likely to prejudice the Trust's commercial interests. A third party is likely to be aware that the Trust as a public authority is subject to FOIA.
18. However, the Commissioner accepts that a causal link exists between disclosure and commercial prejudice to Psicon Ltd's commercial interests. This is the prejudice the Trust explained at paragraphs 14-15. Finally, the Commissioner accepts the Trust's position that the envisioned prejudice would be likely to happen, rather than 'would' happen ie the lower level of likelihood. The Commissioner's decision is therefore that the Trust is entitled to apply section 43(2) of FOIA to the

withheld information and he'll go on to consider the associated public interest test.

19. The complainant considers that any harm caused through disclosing the information would be "vastly outweighed by the public interest." However, they haven't specified what they consider the wider public interest in these template(s) to be.
20. The Trust noted that disclosing the information would contribute towards the aims of openness and accountability which FOIA promotes. It would also show that there's transparency in the use of public funds and that public money is being used effectively.
21. Against disclosure, the Trust said disclosing the information may influence the decision of other companies. It could discourage them from working with the Trust in the future if they feel that there's a risk that sensitive information will be released into the public domain against their wishes. This would weaken the Trust's position in a competitive environment. The Trust considered the public interest favoured it remaining competitive and in protecting its commercial interests and the commercial interests of those who provide services to the Trust.
22. The Commissioner acknowledges that the templates that have been requested are of interest to the complainant, but he considers this information has minimal wider public interest. In their request for an internal review the complainant had said that the Trust could disclose the information only to them; however, disclosure under FOIA is effectively disclosure to the wider world. The Commissioner considers that in this case, the general interest in transparency is outweighed by the public interest in there being fair competition amongst providers of a particular service the Trust procures. And he's noted that that the complainant has already got access to relevant information associated with the template. On balance therefore, the Commissioner finds that the public interest favours maintaining the section 43 exemption in this case.
23. Since the Commissioner has found that section 43 is engaged and the public interest favours maintaining this exemption, it's not necessary to consider the Trust's application of section 36 to the same information.

Right of appeal

24. 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

25. 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.
26. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Cressida Woodall
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF