

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 March 2024

Public Authority: Hywel Dda University Health Board
Address: Corporate Offices, Ystwyth Building
Hafan Derwen, St David's Park
Job's Well Road
Carmarthen
Carmarthenshire
SA31 3BB

Decision (including any steps ordered)

1. The complainant has requested information which was considered by Hywel Dda University Health Board (UHB) during its investigation into a complaint about the treatment and care of a third party at Glangwili General Hospital. UHB refused to disclose the information citing section 31(1)(g) (law enforcement) by virtue of section 31(2)(b) of FOIA.
2. The Commissioner's decision is that UHB was entitled to rely on section 31 to withhold the information. He does not require UHB to take any further steps.

Request and response

3. On 21 August 2023, the complainant wrote to UHB and requested information in the following terms:

"Under the Freedom of Information act that all other information regarding this, which should include but not be limited to, emails, draft copies of reports, etc (to be sent electronically.)"

4. UHB responded on 15 September 2023 and refused to provide the requested information citing sections 21 and 31(1)(g) by virtue of section 31(2)(b) of FOIA. It also decided that the balance of the public interest favoured maintaining the exemption.
5. UHB provided an internal review on 10 November 2023 in which it maintained its original position.

Scope of the case

6. The complainant contacted the Commissioner on 14 November 2023 to complain about the way their request for information had been handled, challenging UHB's application of section 31(1)(g)
7. The Commissioner considers that the scope of his investigation is to determine whether UHB is entitled to rely on section 31(1)(g) by virtue of 31(2)(b) of FOIA as a basis for refusing to provide the information.

Reasons for decision

Section 31-law enforcement

8. Section 31 FOIA provides a prejudice-based exemption which protects a variety of law enforcement interests. The following sets out why the Commissioner has concluded that UHB was entitled to rely on section 31(1)(g) by virtue of section 31(2)(b). The relevant parts of section 31 FOIA provide that:
 - (1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-
 - (g) the exercise of any public authority of its functions for any of the purposes specified in subsection (2),
 - (2) The purposes referred to in subsection (1)(g) to (i) are –
 - (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
9. Section 31 is also subject to the public interest test. This means that not only does the information have to prejudice one of the purposes listed, but it can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure.

10. To engage the exemption at 31(1)(g), a public authority must:
 - identify the public authority that has been entrusted with a function to fulfil one of the purposes listed in subsection (2);
 - confirm that the function has been specifically designed to fulfil that purpose; and
 - explain how disclosure would prejudice that function.
11. The Commissioner is aware that healthcare authorities have specific statutory duties to protect the health and safety of patients against risks posed by the delivery of healthcare services. Section 45(1) of the Health and Social Care (Community Health and Standards) Act 2003 ('HCSA 2003') places a duty on all NHS bodies to: "put and keep in place arrangements for the purpose of monitoring and improving the quality of health care provided by and for that body".
12. The Commissioner must next consider how disclosure would prejudice that function. The prejudice test involves three steps:
 - the actual harm alleged which would or would be likely to occur if the withheld information was disclosed, has to relate to the applicable interests within the exemption (in this case the purpose of protecting persons other than persons at work against risk to health and safety arising out of or in connection with the actions of persons at work).
 - there must be some causal relationship between the disclosure of the withheld information and the prejudice which the exemption is designed to protect against. Furthermore, the alleged resultant prejudice must be real, actual or of substance; and
 - it is necessary to establish whether the level of likelihood of prejudice being relied on is met – 'would' or 'would be likely to'.
13. The Commissioner has considered whether the harm/prejudice under consideration relates to the applicable interests and notes that UHB has explained that disclosing documentation which forms part of the investigation case file would be likely to prejudice the investigatory process that the UHB is duty bound to comply with. It says that UHB is required to operate in accordance with NHS Wales Complaints and Concerns: Putting Things Right (PTR) procedures. The process involves fact finding exercises with clinicians involved in the patient's care before seeking independent clinical opinion from independent practitioners, not familiar or directly involved with the patient's care.

14. UHB added that when investigating complaints, responses can go through numerous quality approval and scrutiny stages during which trained clinical professionals are asked to provide professional opinion on the treatment provided to patients. In addition, UHB says that staff members also ask questions of each other and challenge professional opinions to garner a full picture of the circumstances presented. UHB contends that it will not be within the expectations of those individuals to have their email exchanges and opinions disclosed to the wider public. It explains that the expectation is that the emails are for the purposes of consideration by the case investigation officer to allow them to develop a complete picture and make an assessment of the circumstances presented to enable a comprehensive response to the issues raised.
15. The Commissioner has reviewed the withheld information and notes that it concerns the provision of care to the third party at Glangwili General Hospital and whether the care provided was being compromised due to the practices of the Emergency Department, ambulance off-load and hospital delays, COVID matters and staffing issues. The withheld information in this case can be categorised as frank and open exchanges about sensitive matters together with various draft versions of the report provided in response to the complaint.
16. The Commissioner has considered the personal nature of the matters discussed and accepts that disclosure of the withheld information would make it more difficult for future investigations of a similar kind to be conducted as individuals would be less likely to engage freely and frankly with such investigations for fear that that the record of their contributions may be disclosed. This in turn would undermine the effectiveness of such investigations.
17. The Commissioner considers that investigations into concerns about service provision resulting in potential risks to patients, and allegations of poor care administration, need to be robust and reliable, and to this end, it is important that individuals provide free and frank commentary on the understanding that their contributions will remain confidential.
18. The Commissioner is of the view that disclosure of information for the purposes of ascertaining whether any person is responsible for any conduct which is improper, into the public domain, would be likely to deter staff from co-operating with such investigations in future, and would make staff less likely to provide full and frank contributions to similar future investigations. The Commissioner considers that this could adversely affect the quality of information available in future investigations which could also be detrimental to UHB's ability to exercise its functions under section 45(1) of the HSCA 2003.

19. The Commissioner considers that there is a real and significant risk that disclosure would have a negative impact on the voluntary supply and free flow of candid information. Taking into account the subject matter, and the content of the withheld information the Commissioner believes that disclosure would be likely to prejudice UHB's ability of determining whether any person is responsible for any conduct which is improper. Therefore, he has determined that section 31(1)(g) by virtue of section 31(2)(b) is engaged in relation to the withheld information.

Public interest test

20. Section 31 is subject to the public interest test as set out in section 2 FOIA. This means that although section 31 is engaged, the information may only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

The complainant's arguments

21. In their complaint to the Commissioner, the complainant stated:
- "...The NHS complaint process mentions time and again the requirement for a transparent and open process, they have failed to do this with the refusal to provide copies of the evidence used to in their investigation report, this leaves me to believe they have failed in their duty of care and been negligent on a number of occasions".

Arguments in favour of disclosing the information

22. UHB recognises a public interest in disclosure of information to promote openness and transparency and also to make the public aware that the investigation of complaints is a matter taken extremely seriously by it. It acknowledged that disclosure of the information would make the public understand that UHB is keen to learn from its practice and that the investigation of complaints allows it to identify areas of concern which could be used as a learning tool for the treatment of patients in future.

Arguments in favour of maintaining the exemption

23. UHB has considered that the complaint which was raised about the care and treatment of the third party relates to one patient. As such UHB argued that this is not a matter of interest to the wider public. It contends that to disclose the information would be likely to inhibit the effectiveness of UHB's decision making and the free and frank exchange of views and opinion for the purposes of conducting internal independent reviews.

24. UHB has considered the withheld information which contains objective comments and professional opinion of clinical colleagues after reviewing medical records or directly answering questions from the investigation case officer to aid in their understanding of the circumstances that arose, in order to form a final opinion or response to the complaint. UHB argued that disclosure of the information into the public domain would undermine the integrity of an investigation as staff would feel unable to provide professional opinion when requested for fear of it being released into the public domain without context, justification, or evidence to support their views.
25. UHB says that it relies on its trusted relationships with colleagues when investigating complaints in order to ensure that a comprehensive picture of the patient's treatment can be ascertained, alongside perspectives and opinions of colleagues not involved in their care to understand whether errors which could have impeded the treatment provided were made. It says that disclosure of the information could break or damage this relationship which could impede its ability to undertake thorough investigations in future cases.
26. It asserted that where an individual is dissatisfied with the outcome of their complaint, under the PTR process they are advised to escalate the complaint to the Public Service Ombudsman for Wales (PSOW) and Llais. It explained further that the PSOW has legal powers to investigate complaints about public services in Wales. It says that when a complaint is raised, the PSOW will determine if there are grounds for further investigation. If it finds this to be the case, the PSOW will then request the full case file for further scrutiny.
27. UHB has informed the Commissioner that the complainant was offered a meeting to discuss their concerns in addition to signposting them to the PSOW and Llais. In reaching its conclusion, UHB maintained that based on its arguments, the balance of the public interest favoured maintaining the exemption.

The Commissioner's view

28. In reaching a view on where the public interest test lies in this case, the Commissioner has taken into account the clear public interest in openness and transparency of information relating to an investigation, and the nature of the withheld information as well as the complainant's views.
29. The Commissioner accepts that there is a legitimate public interest in disclosure of information about investigations carried out, particularly in cases where the investigation relates to the provision of care and where allegations have been made about poor treatment.

30. However, the Commissioner is mindful that there is a strong public interest in protecting UHB's ability to conduct effective investigations. The Commissioner is also mindful that disclosure of the withheld information would result in individuals being less likely to provide detailed and frank information ('chilling effect') in the future. This would prejudice UHB's function of ascertaining whether any person is responsible for any conduct which is improper.
31. Taking into account the subject matter, the content of the withheld information and the lack of evidence of any wider public concerns regarding this matter, the Commissioner considers that in all the circumstances of the case, the balance of the public interest is weighted in favour of maintaining the exemption. UHB was not, therefore, obliged to disclose the withheld information.

Right of appeal

32. 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

33. 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.
34. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Esi Mensah
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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