

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 January 2025

Public Authority: Leeds and York Partnership NHS Foundation Trust

Address: St Mary's House
St Martin's View
Chapel Allerton
Leeds
LS7 3LA

Decision (including any steps ordered)

1. The complainant has requested correspondence mentioning a specific organisation. The above public authority ("the public authority") relied on section 36 of FOIA (prejudice to the effective conduct of public affairs) to withhold the information.
2. The Commissioner has applied section 40(2) of FOIA himself proactively, to prevent disclosure of one document containing special category data. The Commissioner's decision is that section 36(2)(c) is not engaged at all. Sections 36(2)(b)(i) and 36(2)(b)(ii) are engaged in respect of all the remaining information, but the public interest only favours maintaining the exemption in respect of some of it. For the remaining information, the public interest favours disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose all the information it has relied on section 36 of FOIA to withhold (making appropriate redactions to comply with its data protection obligations) – with the exception of the email chains titled "referral form" and "north west", along with their respective attachments.
4. The public authority must take these steps within 30 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 23 May 2024 the complainant requested information of the following description:

“Please provide copies of all correspondence making reference to [Beacon Counselling Trust] that has been sent to or from [redacted] from 1 February 2023 to date.

“Reference to BCT’ shall for these purposes include reference or links to any BCT employees and the National Gambling Support Network.”

6. On 3 June 2024, the public authority responded. It refused to provide the requested information and relied on section 36 of FOIA as its basis for doing so. It upheld this position following an internal review.

Reasons for decision

Section 40(2) – third party personal information

7. Section 40(2) of FOIA allows a public authority to withhold information, that is the personal information of someone other than the requester, where there would be no lawful basis in data protection law for publishing that information.
8. The Commissioner notes that one email chain contains information about a particular individual who was referred to the gambling service for clinical treatment. That individual is named and there is extensive biographical information – which would also identify them.
9. The Commissioner appreciates that the complainant probably has no interest in this information, but the design of their request nevertheless means that it catches this particular document.
10. Not only is the document the personal information of the individual concerned, it is also their special category data. It contains information about their ethnicity and sexual orientation. It also contains extensive information about their physical and mental health history and treatment. All of these types of information fall under the definition of special category data.
11. Special category data receives extra protection under data protection law. It can only be published if the person whose personal information it is has either given consent for publication or has manifestly made the information public themselves.

12. As far as the Commissioner is aware, neither condition applies in this case and consequently, it would be unlawful to publish this information.
13. The public authority does not appear to have considered this angle – although it has applied section 36 to all the information in scope.
14. Given the importance of protecting special category data, the Commissioner is of the view that he needs to apply section 40(2) himself, proactively, to prevent any possibility of the information being disclosed.

Section 36 – prejudice to the effective conduct of public affairs

15. Section 36 of FOIA allows a public authority to withhold information that would harm the free and frank provision of advice, the free and frank exchange of views for the purposes of deliberation or would otherwise prejudice the effective conduct of public affairs.
16. In order for the exemption to be engaged, a very senior individual within the organisation, known as the qualified person, must provide an opinion stating either that these harms would be caused by disclosure or that they would be likely to be caused. That opinion must be a reasonable one.

Has the qualified person provided an opinion?

17. The public authority did not provide a separate opinion from its qualified person. However, it did provide a copy of an email exchange between its Chief Executive, Dr Sara Munro and a member of staff from the information rights team.
18. In that exchange, Dr Munro was sent, on 29 May 2024, a draft of the public authority's refusal notice and was asked to "approve" this as an "appropriate response". Dr Munro replied the following day to say "happy for this to go out."
19. Dr Munro is the public authority's chief executive and, as such, is the only person entitled to act as its qualified person for the purposes of FOIA. Whilst there are some deficiencies in the process the public authority followed – which he will come onto later – the Commissioner recognises that the Dr Munro was provided with a recommended "opinion" and she explicitly approved it.
20. The Commissioner is therefore of the view that Dr Munro **did** give an opinion and did so on 30 May 2024.

What was the opinion and was it reasonable?

21. The relevant parts of the refusal stated that:

"As disclosure of this information would have an inhibiting effect on similar communications in the future and would also undermine the work and effectiveness of investigations into the wider impacts of gambling harms, which may hinder our ability to help people in the future, it is therefore our opinion that it would be improper to release any such correspondence.

It is the opinion of our Chief Executive, Dr Sara Munro, that it is eminently reasonable that our Trust allows the free and frank exchange of views for the purposes of deliberation to take place in confidence, and that our Trust is seen to do so. As such, it would be improper to release information that would undermine this process.

"We therefore withhold provision of such correspondence on the grounds that, under the terms of the Freedom of Information Act 2000, this is exempt under Section 36:- 36(2) b (i) and b (ii) and c as it is the reasonable opinion of our qualified person that a public authority shall not disclose information which; (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 (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

"The public interest weighs in favour of a reasonable expectation that any free and frank discussions are withheld from disclosure, as it is likely that disclosure of the requested information would inhibit such future frankness and candour and that this would hinder the sharing of knowledge and lead to poorer decision making.

"There is a clear public interest in engaging in discussions which raise awareness and further examine the wider impact of the devastating effects of gambling disorder and inhibiting the ability of our staff and others to express themselves openly and honestly when providing advice and sharing their views would potentially impair our ability to offer future advice and support for people affected by gambling harms and families bereaved by gambling-related suicides. We consider that the public interest is best served by preventing those consequences."
[Emphasis added]

22. As noted above, the Commissioner accepts that, in approving a draft response, Dr Munro did provide an opinion. However that does not require him to accept that the entire correspondence represents Dr Munro's opinion.

23. The Commissioner has considered this correspondence carefully and in his view, only the emboldened passages should be treated as being Dr Munro's opinion.
24. The qualified person is only required to give their view on the potential harms that might arise from disclosure and how likely those harms are to arise. They are not required to assess the balance of the public interest. Therefore the last two paragraphs quoted above cannot reasonably be said to represent Dr Munro's opinion as she would have known that it was not her role to assess the balance of the public interest.
25. The first paragraph does not refer to Dr Munro (or the qualified person) at all. It refers to "our opinion" implying that any views were the views of the organisation as a whole – whereas the following two paragraphs refer specifically to Dr Munro's (or the qualified person's) opinion.
26. Whilst this may seem a pedantic point, it is, in fact, important. Section 36 places considerable power into the hands of the qualified person and the Commissioner is required to give their opinion a much greater margin of appreciation than he would for most other submissions. The Commissioner therefore considers that he should adopt a relatively restrictive view of what the qualified person's opinion is.
27. In this case, it is not clear whether Dr Munro intended all of the first three paragraphs to be her opinion or not. She may have picked up on the distinction between the organisation's opinion and her own – or she may not.
28. The Commissioner's view is that he cannot, on the basis of the available evidence, accept the first paragraph as being part of Dr Munro's opinion. The letter drew a clear distinction between what was Dr Munro's opinion and what was "our" opinion. Dr Munro approved this distinction – whether she intended to or not.
29. Incidentally, this situation is one of the reasons the Commissioner recommends all public authorities use his [template for recording the opinion of the qualified person](#).
30. The qualified person's opinion is that disclosing the information in question would inhibit the free and frank provision of advice, inhibit the free and frank exchange of views for the purposes of deliberation and otherwise prejudice the effective conduct of public affairs. No reasoning was provided, by Dr Munro, for believing this to be the case, other than that disclosure would "undermine this process."
31. When deciding whether an opinion is reasonable, the Commissioner must not substitute his own opinion for that of the qualified person. The

qualified person's opinion does not have to be the most reasonable opinion available. It simply has to be an opinion a reasonable person might hold.

32. An opinion only needs to be reasonable on its face, the public authority does not need to demonstrate that it has also been reasonably arrived at.
33. An opinion will not be reasonable if it is irrational, absurd or if it fails to identify an applicable interest.
34. In respect of inhibition, the Commissioner does not consider it unreasonable to suppose that staff may feel some inhibition in future if they are concerned that their correspondence will become public. That concern will be well-grounded if the contents of their previous correspondence have been published.
35. Whilst the Commissioner is sceptical that this inhibition will be severe, he recognises that it is not irrational to think that some inhibition might occur.
36. It is not clear, from Dr Munro's opinion, what her assessment of the likelihood of the inhibition occurring was.
37. When considering any harm-based exemption under FOIA, "would" and "would be likely to" mean two different things and are mutually exclusive. The former means that the harm is more likely than not to occur; the latter means that the chance of harm is lower than 50% but more than hypothetical.
38. Dr Munro referred to both thresholds in her opinion, without indicating which one was relevant to this particular information. The preceding paragraph used the word "would" but, as has already been discussed, this does not form part of Dr Munro's opinion.
39. The Commissioner has therefore reached the view that it is the lower bar of "would be likely to" cause inhibition that should be engaged here. The senders of the emails concerned are people who hold important roles within their respective organisations and should therefore be robust individuals. The Commissioner considers it reasonable to believe that there is a small chance of inhibition, but he does not consider it reasonable to suppose that this is more likely than not to occur.
40. These parts of the exemption are therefore engaged.
41. Dr Munro also stated that disclosing the information would "otherwise" prejudice the effective conduct of public affairs. She gave no reason why this would be the case.

42. In order for the disclosure of information to "otherwise" prejudice the effective conduct of public affairs, the qualified person must identify a harm that would result from disclosure and that would not be covered by any other exemption.
43. Dr Munro did not identify any harm other than "inhibition" – which is already covered by the other parts of section 36 of FOIA.
44. As the qualified person has failed to identify an applicable interest that could be harmed, let alone explain why that would result from disclosure or how likely it would be, the Commissioner cannot accept this part of her opinion as reasonable. Consequently disclosure would not "otherwise" prejudice the effective conduct of public affairs.

Public interest test

45. Even where disclosure would be likely to cause inhibition, information must still be disclosed unless the balance of the public interest favours maintaining the exemption.
46. Given that the qualified person has stated that disclosure would be likely to cause inhibition and given that the Commissioner considers this to be a reasonable view, there will always be some inherent public interest in preventing that inhibition from occurring. The weight to be assigned to that interest will depend on the likelihood of the harm and its severity if it did occur.
47. In support of its position, the public authority provided a statement from the individual named in the request. The individual stated it was in the public interest that they be "allowed to have free and frank exchanges regarding the nature of gambling laws, regulation and matters where I have expertise in relation to treatment and research." They also noted that "the FOIA process appears to be being used by individuals and organisations connected with the gambling industry...constraining my ability to do my job in the public interest and to promote the interests of the public."
48. The Commissioner has treated this statement with caution for two reasons.
49. Firstly, it is very difficult for any individual to make an objective assessment of the public value of their correspondence.
50. Secondly, the statement strays into looking at the likelihood of the individual (or anyone else) being inhibited in their correspondence. Whilst the individual clearly has an interest in putting their views across, it is the qualified person and only the qualified person, who can determine the likelihood of inhibition.

51. It is not clear whether this statement was provided to Dr Munro prior to her giving her opinion. If it was, it has already been factored in to that opinion and giving additional weight to it here would risk double-counting. If it was not provided to Dr Munro, the Commissioner must disregard any argument bearing on the likelihood of inhibition occurring – as this is the qualified person's assessment to make.
52. Nevertheless, the Commissioner does consider that the statement contains some arguments that relate to the weighing of the public interest balance and which require addressing.
53. FOIA should not be used in a way that bullies, harasses or intimidates public authorities or their staff. There are appropriate safeguards in the legislation to guard against such abuses – those safeguards have not been deployed here.
54. Gambling can be incredibly harmful, both to the gambler themselves and to those around them. There is a strong public interest in ensuring that those at risk of harm are able to access appropriate treatment and that there are safeguards in place to protect them from harm in the first place.
55. Equally, an even larger number of people enjoy gambling and can do so with minimal risk of harm to themselves or their families. The industry is one that supports large numbers of jobs across the UK.
56. It is not for the Commissioner to determine how gambling should be regulated, how the addiction should be treated, or what the service model for that treatment should be.
57. The Commissioner does recognise though that, where there are competing visions about the best policy outcomes, that enhances the public interest in transparency.
58. The withheld information comprises of a series of email chains of varying length. They involve the public authority and various other stakeholders in the field. Some of these are the staff of other public authorities.
59. In the Commissioner's view, those who work for public authorities should be aware that their correspondence is subject to FOIA and could be disclosed. That should not prevent them from providing their robust advice and opinions.
60. Those corresponding with public authorities should also be aware that their correspondence could be disclosed. The Commissioner is not persuaded that any of the third parties involved would have failed to correspond with the public authority or would have made significant changes to their correspondence, if they knew it would be published.

61. In the Commissioner's view, the content of the correspondence is largely anodyne, with few in-depth discussions about future services. To the extent that any future inhibition is likely, he is not persuaded that it would be severe.
62. The Commissioner is not persuaded that there is an exceptionally strong public interest in favour of disclosure here – the complainant's motivation appears to largely be a private dispute with the public authority. However, he is equally unpersuaded that the public interest in maintaining the exemption is strong – and therefore disclosure must prevail.
63. There is one exception: one of the email chains attaches a draft agreement between various parties. It is not clear whether this even resulted in an agreement, let alone whether the final agreement closely reflected the draft.
64. The Commissioner accepts that the public interest favours maintaining the exemption in relation to this document. The document was a draft and the Commissioner accepts that disclosing it would have intruded on the safe space that officials required in order to develop policy options. It would also have risked putting a misleading document into the public domain, confusing people (and particularly people in vulnerable situations) as to what had been agreed. This document can therefore be withheld.
65. The remaining information (apart from that already covered by section 40(2) of FOIA) must be disclosed. The Commissioner recognises that it contains contact details and the names of junior staff. There are also some references within the correspondence to the individuals' private lives. These can be redacted as section 40(2) of FOIA would also apply to them.

Right of appeal

66. 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

67. 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.
68. 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

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