

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 January 2015

Public Authority: Mid Yorkshire Hospitals NHS Trust
Address: Pinderfields Hospital
Aberford Road
Wakefield
WF1 4DG

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the Mid Yorkshire Hospitals NHS Trust ("the Trust") for information relating to problems with the call centre for patient appointments. The Trust disclosed some of the requested information but withheld other information under the exemptions in section 31 (Law enforcement), section 36 (effective conduct of public affairs etc) and section 40(2) (personal information). During the course of the Commissioner's investigation the Trust disclosed some further information to the complainant but continued to withhold information under these exemptions.
2. The Commissioner's decision is that the section 31(1)(g) and section 36(2)(c) exemptions are not engaged and that Section 36(2)(b)(ii) is engaged but the public interest in disclosure outweighs the public interest in maintaining the exemption. The Commissioner finds that section 40(2) is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The Trust shall disclose to the complainant the information withheld under sections 31(1)(g), 36(2)(b)(ii) and 36(2)(c).
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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 31 January 2014 the complainant made a freedom of information request to the Trust which read as follows:

Under the Freedom of Information Act, please send me all reports compiled by the trust into the problems experienced with the call centre for patient appointments during the latter half of 2013.

I would also like a copy of all memos sent to chief executive Stephen Eames concerning the issue.

Please also let me have details of when the contract for the service was contracted to the company, the annual cost of the contract and details of any compensation the company concerned is paying.

6. The Trust did not respond to the request until 1 May 2014, after the intervention of the Commissioner. In its response the Trust disclosed some of the requested information but other information was withheld under the exemptions in section 31 (law enforcement), section 36(2)(b)(ii) (free and frank exchange of views) and section 43(2) (Commercial interests).
7. The complainant subsequently asked the Trust to carry out an internal review of its handling of the request and it presented its findings on 9 July 2014. The review found that information redacted from a Report to the Quality Committee should continue to be withheld under the exemptions in section 31(1)(g) and section 36(2)(b)(i) and (ii). It also referred to the Root Cause Analysis Report which was being withheld under the same exemptions. It explained that it was no longer seeking to rely on the section 43 exemption but that it was now relying on the section 40 exemption to withhold the names of individuals mentioned in the information.

Scope of the case

8. On 2 September 2014 the complainant contacted the Commissioner to complain about the Trust's decision to refuse to disclose some of the requested information.
9. During the course of the Commissioner's investigation the Trust disclosed to the complainant the Report to the Quality Committee in its entirety. It also disclosed some information in the Root Cause Analysis Report but with some information redacted which continued to be withheld under the exemptions in section 31(1)(g), section 36(2)(b)(ii), section 36(2)(c) and section 40(2).
10. The Commissioner considers the scope of his investigation to be to consider whether the remaining withheld information should be disclosed or whether these exemptions should be applied.

Reasons for decision

11. The request concerns a serious incident with the Trust's outpatient booking system in 2013. This resulted in some patients being delayed in receiving their appointments which in turn may have delayed their treatment. The information that continues to be withheld are redactions made to a 'Root Causes Analysis Investigation Report' (RCA) which the Trust carried out to determine the reasons for the problems with the booking system and how this could be prevented in future.
12. The Commissioner has first considered whether the section 31(1)(g) exemption can be applied to this information.

Section 31 – Law enforcement

13. Section 31(1)(g) of FOIA provides that information is exempt if disclosure would or would be likely to prejudice the exercise by any public authority of its functions for any of the purposes specified in section 31(2).
14. In this case the relevant subsection is section 31(2)(j): the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.

15. In order to engage the exemption the Commissioner requires the function identified by the public authority for the purposes of section 31(1)(g) to be a function which is:
 - i. designed to fulfil one of the purposes specified in section 31(2) and,
 - ii. imposed by statute (or in the case of a government department, authorised by the Crown) and,
 - iii. specifically entrusted to the relevant public authority to fulfil (rather than just a general duty imposed on all public authorities).
16. The Trust explained that as part of its statutory function to provide NHS services to the public it is necessary to ensure that the services are provided in a manner which protects patients against risks to their health and safety which arise out of or in connection with the action of its staff. It also said that it considered that it had a common law duty of care to its patients and that this may require it to undertake issues which arise in order to avert the risk of future harm.
17. 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. In particular, section 45(1) of the Health and Social Care (Community Health and Standards) Act 2003 places a duty on all NHS bodies to:

"put and keep in place arrangements for the purposes of monitoring and improving the quality of health care provided by and for that body."
18. Therefore he is satisfied that the Trust performs a relevant function in relation to section 31(1)(g) of the FOIA and the Trust exercises this function for the purposes of protecting persons (patients) other than person's at work against health or safety arising out of or in connection with the actions of persons at work (Trust staff) as outlined in section 31(2)(j).
19. The Commissioner has now gone on to consider the nature of the prejudice claimed by the Trust and the likelihood of the prejudice occurring. On this point the Trust explained that the information redacted from the RCA consists of frank assessments about the performance of employees of the Trust as well as other issues associated with the appointment booking system. It argued that disclosure would be likely to prejudice future investigations because it would deter "prompt, open discussion of any issues that arise and the expression of views on what has contributed to those issues". It said

that this was particularly true because a number of individuals are specifically named in the information.

20. The Commissioner has considered the Trust's arguments but is not convinced that disclosure would have the effects suggested. The Commissioner has reviewed the information and finds that the information is written in a fairly formal language that one might expect from an official report of this kind. In the Commissioner's view, the information is not especially frank or candid that disclosure would discourage staff from contributing to investigations in future. Much of the information is factual and describes the sequence of events that led to the problems with the appointment booking system. Moreover, the Commissioner is struck by the fact that, despite what was suggested by the Trust much of the redacted information is not attributable.
21. The Commissioner considers it unlikely that individuals would be discouraged from cooperating with such internal reports in future to the extent that it would prejudice the Trust's ability to carry out similar investigations in future. In reaching this decision the Commissioner is mindful that those who contributed to the report are either employees of the Trust or contractors and therefore would have a duty to cooperate with any investigation and indeed the public would expect that they should not be easily deterred from doing so.
22. The Commissioner has not seen any evidence to suggest that people would be reluctant to contribute to investigations in future or that they had expressed concern about the potential for disclosure in this particular case.
23. The Commissioner also considers that the Trust's concerns around identifying individuals can be addressed by the redaction of the names of staff and the Commissioner has discussed this below when dealing with the section 40(2) exemption.
24. For the reasons given, the Commissioner has decided that the section 31(1)(g) exemption is not engaged.

Section 36 – Prejudice to effective conduct of public affairs

25. The Trust has additionally applied the section 36 exemption to the information redacted from the RCA report. Under section 36(2) information is exempt if, in the reasonable opinion of a qualified person, disclosure:

(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.*

26. The correct qualified person for the Trust is its Chief Executive. The Commissioner understands that the qualified person initially gave his opinion that section 36 should be applied when the Trust responded to the request. However, following the complaint to the Commissioner and the Trust deciding to release a lot of the previously withheld information, it asked the qualified person to reconsider the application of the exemption in respect of the remaining withheld information that has been redacted from the RCA report. The opinion was given on 12 November 2014 and confirmed that the information should continue to be withheld under the specific subsections of section 36(2)(b)(ii) and section 36(2)(c). His opinion was that the exemptions should be engaged on the basis that disclosure 'would be likely' to cause prejudice rather than 'would' cause prejudice.
27. Having satisfied himself that the Trust has obtained the opinion of the qualified person, in order to determine whether the exemption is engaged the Commissioner must then go on to decide whether this opinion is reasonable. This involves considering:
- whether the prejudice claimed relates to the specific subsection of section 36(2) that the Trust is relying upon;
 - the nature of the information and the timing of the request; and
 - the qualified person's knowledge of or involvement in the issue.
28. The Commissioner has also issued guidance on section 36 of the FOIA. With regard to what can be considered a 'reasonable opinion' it states the following:
- "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 person could hold – then it is reasonable."*
29. The qualified person's opinion is that section 36(2)(b)(ii) is engaged for essentially the same reasons as section 31 was applied. As with section 31, it suggested that "staff would be more reluctant to candidly and

promptly express their opinions and views, if there was a real possibility of disclosure to the public”.

30. It also appears that section 36(2)(c) has been applied for the same reasons, i.e. because it would deter open discussions in future investigations. Therefore, the Commissioner has dismissed the section 36(2)(c) exemption as the arguments will already be considered under section 36(2)(b)(ii) and so it is not necessary to cite the additional limb of the exemption. The Commissioner would remind public authorities that section 36(2)(c) is intended to apply to cases not covered by another specific exemption. So, if section 36(2)(c) is used in conjunction with any another exemption, the prejudice envisaged must be different to that covered by the other exemption. Furthermore, the fact that section 36(2)(c) uses the phrase “otherwise prejudice” means that it relates to prejudice not covered by section 36(2)(a) or (b).
31. As regards section 36(2)(b)(ii) it is important to note that when considering whether the exemption is engaged the Commissioner is making a decision not on whether he agrees with the opinion of the qualified person, but whether it was reasonable for him or her to reach that opinion. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold he must find that the exemption is engaged. As a result, it is possible to find that the Trust’s arguments do not satisfy the prejudice test for applying the section 31 exemption but are sufficient for applying section 36(2)(b)(ii).
32. It is not unreasonable to suppose that disclosure of internal information might affect the frankness with which staff contribute to future investigations, even though the Commissioner would disagree with the likelihood of this occurring. Similarly, it is possible that disclosure may cause some inhibition to the way in which staff express themselves in future investigations which means that the qualified person’s opinion is a reasonable one, although this would have very little impact on the ability of the Trust to carry out a similar investigation in future.
33. In reaching this view the Commissioner has also taken into account the fact that the qualified person was provided with copies of the withheld information, the Commissioner’s guidance on the use of the section 36 exemption as well as counter arguments to applying the exemption and that this material should have allowed him to reach a balanced decision.
34. The Commissioner has decided that the qualified person’s opinion was a reasonable one and that therefore section 36(2)(b)(ii) is engaged. The Commissioner will now go on to consider the public interest test which

involves balancing the public interest in maintaining the exemption against the public interest in disclosure.

Public interest test

Public interest arguments in favour of disclosure

35. In favour of disclosure the complainant has argued that the matter is of legitimate public interest because the failure of the patient appointment system saw at least 13,000 outpatients fail to receive appointment letters, while others received them in error. He said that this wasted considerable amounts of public money and affected patient care.
36. The complainant argued that there is considerable public debate about the use of private companies to deliver key NHS services which he said was what had happened in this case. Disclosure would help, he said, to shine light on the actions of the company involved.
37. According to the complainant, the Trust has a history of being badly run and therefore the public interest favours full transparency to allow the public to judge whether it is being run effectively.
38. For its part, the Trust acknowledged that there is a public interest in transparency and accountability, and in the spending of public money. It said that it was clear from the information in the public domain that there were issues with the call centre patient appointment system, a service which it had contracted out.
39. The Trust added that there was a public interest in understanding whether the monitoring arrangements in place at the Trust identified possible problems at an appropriate time and what was done about this.

Public interest arguments in favour of maintaining the exemption

40. As discussed above in relation to both section 31 and section 36, the Trust has said that it considers that it is best able to conduct a robust investigation into concerns if those involved in the investigation can be assured that the detail will not be published. It reiterated that disclosure was likely to deter staff from participating.
41. The Trust said that details about how the Trust handled this issue (such as details of the issues identified, scope of the investigation and recommendations) were already in the public domain and so this goes some way to helping people understand the context and outcome of the RCA report.

Balance of the public interest

42. First of all, the Commissioner must find that having accepted the opinion of the qualified person is a reasonable one this carries a certain amount of weight through to the public interest test. Although, the Commissioner notes that the opinion is only that disclosure 'would be likely to' inhibit and so the weight is not as great as the higher test of 'would' inhibit.
43. However, the exact weight that should be given to maintaining the exemption depends on the particular circumstances of the case. This means that whilst the Commissioner accepts that a reasonable opinion has been expressed that inhibition would be likely to occur he will go on to consider the severity, extent and frequency of that inhibition in forming his own assessment of whether the public interest test dictates disclosure.
44. As the Commissioner has explained, he is prepared to accept that the qualified person's opinion is a reasonable one. However, his own view, as discussed in relation to section 31, is that disclosure is unlikely to have a significant effect on the willingness of staff and others to contribute to investigations by the Trust or else any inhibition caused to the free and frank manner with which staff members contribute is not sufficiently severe, extensive or frequent to prejudice the ability of the Trust to carry out investigations in future.
45. In reaching this view the Commissioner is mindful that the report concerns an issue that is no longer live and, as discussed in relation to section 31, the information itself is not especially frank or candid. The Commissioner is not aware that staff were given assurances of confidentiality and he considers that any concerns about identifying staff can be dealt with through appropriate redaction.
46. On the other hand there are strong public interest arguments in favour of disclosure. Whilst the Trust has now released a significant amount of information this only gives a partial picture of the problems with the patient appointment system and in particular says very little about what actually went wrong. It is still unclear from the disclosed information exactly why the system failed and therefore in the Commissioner's view there is a greater argument for transparency.
47. In the Commissioner's view there is also a legitimate public interest in knowing more about the role played by private companies in the NHS and disclosure would shed more light on this issue.

48. The Commissioner has given due weight to the opinion of the qualified person but finds that there are particularly compelling arguments for greater transparency and accountability and that this tips the balance in favour of disclosure.

Section 40(2) – Personal information

49. A small amount of information withheld under section 31 and section 36 has been additionally withheld under section 40(2). This includes the names of individuals identified in the report and in 3 instances where the information includes personal details such as their employment history.
50. Section 40(2) provides that information is exempt if it is the personal data of someone other than the applicant and disclosure would contravene one of the data protection principles. In this case the Trust has said that disclosure would contravene the first principle which requires that data be processed fairly and lawfully.
51. The first thing to mention is that the complainant has agreed that the names of the Trust's staff can be redacted with the exception of the Trust's board members – the most senior people within the Trust. Therefore, the Commissioner is content that the names and personal details of individuals below the level of the Trust's board can be redacted.
52. Having reviewed the withheld information the Commissioner can find no reference to a member of the Trust's board in the material that has been withheld under section 40(2). Therefore it would appear that the application of section 40(2) is not in dispute.
53. The Commissioner found three references to members of staff which did not name individuals but which in his view would allow them to be identified. The individuals are not board members and as the Commissioner has explained, the complainant had indicated that such information need not be disclosed. However, for the avoidance of doubt, the Commissioner confirms that this information is personal data and should be withheld. In the Commissioner's view disclosure would be unfair because the information relates to junior members of staff and discusses their employment history, for instance sickness absence. There would be a reasonable expectation that this information would not be disclosed.
54. The Commissioner is satisfied that the information withheld under section 40(2) need not be disclosed.

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@hmcts.gsi.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

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