

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 March 2019

Public Authority: Nottinghamshire Healthcare NHS Foundation Trust

Address: Duncan MacMillan House
Porchester Road
Nottingham
NG3 6AA

Decision (including any steps ordered)

1. The complainant has requested a copy of an NHS inquiry into an Immigration Removal Centre. This was initially refused by Nottinghamshire Healthcare NHS Foundation Trust ("the Trust") on the basis of section 36(2)(c) of the FOIA. The Trust later sought to also apply the exemptions from disclosure at section 31, 41 and 40 of the FOIA.
2. The Commissioner's decision is that the Trust has correctly applied the provisions at section 31(e) and (f) and that the public interest favours maintaining the exemption. She requires no steps to be taken.

Request and response

3. On 16 April 2018, the complainant wrote to the Nottinghamshire Healthcare NHS Foundation Trust ("the Trust") and requested information in the following terms:

"Under the Freedom of Information Act could you please provide me with a copy of the March 2016 NHS inquiry into Morton Hall referenced in this article: <https://www.mirror.co.uk/news/uk-news/no-one-listened-now-four-11964977>

Could you also provide me with any information Nottinghamshire Healthcare NHS Foundation Trust holds on the whistle blowing report referenced in the same article."

4. The Trust responded on 3 May 2018 and confirmed the requested information was held but considered it was exempt from disclosure on the basis of section 36(2)(c) of the FOIA.
5. Following an internal review the Trust responded on 21 May 2018 upholding its decision to withhold the report on the basis of section 36(2)(c).

Scope of the case

6. The complainant contacted the Commissioner on 1 June 2018 to complain about the way her request for information had been handled.
7. During the course of the investigation, the Trust sought to apply additional exemptions to withhold the information. It cited sections 31(1)(b), (c), (e) and (f) as well as section 40(2) and 41 of the FOIA.
8. The Commissioner considers the scope of her investigation to be to determine if any of these exemptions as well as section 36(2)(c) provide a basis for withholding the report in its entirety.

Background

9. IRC Morton Hall is an Immigration Removal Centre accommodating over 300 adult men who are brought into detention by the Home Office under immigration legislation. The Centre is run by the HM Prison and Probation Service on behalf of the Home Office.
10. The Trust took over responsibility for the provision of health care at the Centre in April 2015 from the previous provider, G4S. The article referenced by the complainant in their request to the Trust refers to a number of whistleblowers reporting their concerns to the Trust about the situation at the Centre. The information held by the Trust in the scope of the request is the report produced by the Trust in February 2016 relating to the Centre. This report contains details of allegations made by the whistleblowers and the issues that were investigated in line with the Trust's whistleblowing policy with the outcomes detailed in the report.

11. The report of the investigation contains a significant amount of personal data of named individuals and information about working and other arrangements within the Centre.

Reasons for decision

12. The Commissioner has firstly focused her attention on the section 31 exemption as this seems to be the most relevant to the information.
13. Section 31 provides a prejudice based exemption which protects a variety of law enforcement interests. In this case the Trust considers that sections 31(1)(b), (c), (e) and (f) apply. Those sections state:

"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—

(b) the apprehension or prosecution of offenders,

(c) the administration of justice,

(e) the operation of the immigration controls,

(f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained, "

14. Consideration of this exemption involves two stages. First, in order to be engaged, the following criteria must be met:
 - the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold (would be likely), the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility: rather, there must be a real and significant risk. The Commissioner considers that the higher threshold places a stronger evidential burden on a public authority to

discharge. The chances of the prejudice occurring should be more probable than not.

15. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

The applicable interests

16. The relevant applicable interests cited in this exemption are the apprehension or prosecution of offenders, the administration of justice, the operation of immigration controls and the maintenance of security and good order in lawful detainment institutions.
17. The allegations to which the report relates are wide-ranging and cover issues including management structure and performance, working conditions, patient care and safety, staffing levels and the quality of mental health and GP provision. Investigation of these allegations required an in-depth analysis of operational arrangements at the Centre and this is set out in some detail in the report.
18. The Commissioner is satisfied that the prejudice the Trust is envisaging in this case is relevant to some of the particular interests that the exemption is designed to protect. This is because it is clear the report covers a number of areas which relate to the operation of the immigration centre and the maintenance of good order and security – information on staffing levels, structure, conditions and patient care will all contribute to the good order and security of the Centre. The Commissioner is less clear on how this information would relate to the apprehension or prosecution of offenders or the administration of justice but she does accept the prejudice envisaged by the Trust is relevant to the interests at subsections (e) and (f).

The nature of the prejudice

19. The Commissioner next considered whether the Trust demonstrated a causal relationship between the disclosure of the information and the prejudice that sections 31(1)(e) and (f) are designed to protect. In her view, disclosure must at least be capable of harming the interest in some way, i.e. have a damaging or detrimental effect on it.
20. The Trust argues that disclosing the in-depth analysis in the report would be likely to result in the stated prejudice as it would reveal the nature of some of the allegations that had been made, and regardless of whether these were found to be unsubstantiated or not, this would be prejudicial to the operation of the IRC.

21. The Trust is of the view that it is integral to the safe and proper operation of a secure institution such as this IRC that good order is maintained. Disclosing the report may enable challenge to be made to that order which would inevitably divert resources away from the mainstream operation of the IRC. As well as this it would lead concern and unease amongst the population at the Centre and their families and visitors. The Trust points to statements made by the HM Prison and Probation Service that the Centre "*provides an active regime that allows detainees access to family contact, legal support and a range of activities*" and argues that any unease or unrest that might occur from the publication of the report would be likely to undermine the success of this regime.

The likelihood of the prejudice occurring

22. With respect to the likelihood of prejudice occurring, in its correspondence with the Commissioner the Trust confirmed that disclosure *would be likely* to prejudice the specified functions.

Is the exemption engaged? Would disclosure be likely to prejudice the operation of immigration controls or the maintenance of security and good order in institutions where persons are lawfully detained?

23. The Trust's arguments primarily concern the impact of disclosure on the maintenance of good order in the Centre due to the unease this would cause and the diversion of resources that would occur that would affect the running of the IRC.
24. The Commissioner is aware that the report followed a number of allegations about the IRC including patient care, staffing, working conditions and performance. As a result all of these areas were subject to an in-depth analysis by the Trust and, having viewed the report, the Commissioner can confirm that there is a significant level of detail in the report. Regardless of the findings of the report and whether any of the allegations had substance it does not seem unreasonable to assume that publishing the report in full would have an impact on the IRC. Disclosing this level of detail about the inner workings of the Centre will lead to increased external scrutiny from various sources and these would most likely include the Centre's population and families. Any unrest or unease is likely to impact on the effective running of the Centre and the Commissioner accepts the Trust's arguments on this point.
25. It follows therefore that there would be a likely prejudice to the operation of the immigration controls and, perhaps more strongly, the maintenance of security and good order in institutions where persons are lawfully detained.

26. Having duly considered the arguments put forward by the Trust, and having viewed the withheld information, the Commissioner is satisfied that the arguments are relevant to section 31(1)(e) and (f).
27. She is also satisfied that there is more than a hypothetical or remote possibility of prejudice occurring if the withheld information were to be disclosed. Accordingly, the Commissioner accepts that, in the circumstances of this case, the lower threshold of likelihood is met.
28. As the Commissioner accepts that the outcome of disclosure predicted by the public authority would be likely to occur she is therefore satisfied that the exemption provided by sections 31(1)(e) and (f) is engaged.

Public interest

29. Section 31 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

30. The complainant argues that whilst it is understandable that anyone involved in the compilation of the report may want to have their remarks remain confidential, the value of the report is diminished if it remains private and unpublished. The complainant argued that many comments had already been disclosed and pointed to a news article¹ and argued that this lessened the arguments for withholding the report.

Public interest arguments in favour of maintaining the exemption

31. The Trust argued that it was important that persons who are subject to detention have confidence in the system of management and the provision of healthcare within the institutions in which they are detained. Disclosure of the report would undermine this by allowing the public sight of allegations that were serious, regardless of whether they were found to have merit or not.
32. The Trust is aware that some individuals have provided information to the press but does not consider this minimises the likely prejudice that would be caused by disclosure of the report nor undermine the public interest in withholding it as there is significant detail in the report which

¹ <https://www.mirror.co.uk/news/uk-news/no-one-listened-now-four-11964977>

is not in the public domain and relates to the operation of the Centre on many different levels.

33. The Trust argues it has made improvements since taking over responsibility for the provision of healthcare from G4S and that this improvement could be undermined by publication and this would not be in the public interest.

Balance of the public interest arguments

34. In reaching a view on where the public interest lies in this case, the Commissioner has taken into account the nature of the withheld information as well as the views of both the complainant and the Trust.
35. She accepts that it is important for the general public to have confidence in the operation of immigration centres. Accordingly, there is a general public interest in disclosing information that promotes accountability and transparency in order to maintain that confidence and trust. In the case of IRC's there has been negative media attention focused on incidents that have occurred and therefore there is a strong argument for disclosure of information which would go some way to demonstrating that the Centres are being operated appropriately.
36. She also recognises that there is a very strong public interest in protecting immigration controls and the maintenance of good order in IRC's. The Commissioner considers that appropriate weight must be afforded to the public interest inherent in the exemption - that is, the public interest in avoiding prejudice to the operation of the immigration controls and the maintenance of security and good order in detention centres.
37. In this case, she recognises the strong public interest in withholding this specific report given the nature of the information it contains. The report was intended to provide a thorough analysis of all aspects of the management and operation of the IRC. The Trust conducted this investigation to fully investigate the allegations made, some of which came from whistleblowing concerns, and analysed the IRC's management structure, staff welfare, conditions and healthcare provision. Whilst it is recognised there is a public interest in disclosing information that would allow the public to scrutinise the operation of the IRC in light of the issues that have been reported in the media, the Commissioner must balance this against the damage that could be done to the Trust's ability to continue to provide effective healthcare services and to contribute to the effective management of the IRC.
38. Any impact on the ability of the IRC to function effectively and to maintain good order would not be in the public interest. The detail in the

report on the operational side of things as well as the staffing issues is a level of detail that would not normally be made publicly available and whilst it may be of some public interest to understand how the IRC is run the detrimental impact of this on the short-term running of the IRC is much greater, particularly as it would reveal the nature of the allegations made even if they were unfounded.

39. The Commissioner considers this is a finely balanced case but she must give due weight to the inherent public interest in the exemption – as she has accepted there is a likely prejudice to the operation of immigration controls and to the maintenance of security and good order this will carry significant weight as it is clearly not in the public interest to undermine this. This combined with the risk and detriment caused due to the nature of the information and the detail about the allegations contributes to outweighing any public interest there may be in disclosure.
40. Having given due consideration to the opposing public interest factors in this case, the Commissioner has concluded that the factors in favour of disclosure do not equal or outweigh those in favour of maintaining the exemption.
41. Accordingly the Commissioner is satisfied that sections 31(1)(e) and (f) of the FOIA were applied appropriately in this case.
42. She has therefore not gone to consider the other exemptions in this case.

Right of appeal

43. 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

44. 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.
45. 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
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF