

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 September 2019

Public Authority: NHS Vale of York Clinical Commissioning Group
Address: West Offices
Station Rise
York
YO1 6GA

Decision (including any steps ordered)

1. The complainant has requested a copy of an external 'lessons learned' review into an Aligned Incentive Contract with York Teaching Hospitals NHS Foundation Trust. NHS Vale of York Clinical Commissioning Group ('the CCG') released a summary of the review report and has withheld the remainder of the report under section 36(2)(b)(i) and 36(2)(b)(ii) and section 36(2)(c) of the FOIA (prejudice to the effective conduct of public affairs). The CCG considers the public interest favours maintaining this exemption.
2. The Commissioner's decision is that the CCG can rely on section 36(2)(b) to withhold the remainder of the lessons learned review report, and that the public interest favours maintaining the exemption.
3. The Commissioner does not require the CCG to take any remedial steps.

Request and response

4. In his complaint to her the complainant told the Commissioner that the information he has requested concerns a lessons learned review into failings with an Aligned Incentive Contract (AIC) drawn up in 2018 to improve NHS finances. The complainant says that the CCG had previously been put under formal legal directions from its regulator due to a history of poor financial performance. The AIC was, the complainant

5. says, agreed by two CCGs, the local NHS trust (York Teaching Hospitals NHS Foundation Trust) and both regulators: NHS England and NHS Improvement. It was designed to stabilise finances and lift legal directions. The complainant says that this did not happen because finances continued to deteriorate and that the CCG is expected to end 2018-19 in deficit by £18.6m. This is similar to its performance the previous year and £6m worse than expected.
6. On 4 January 2019 the complainant wrote to the CCG and requested information in the following terms:

"Under the Freedom of Information Act, please send me a copy of the external "lessons learnt" review received by the CCG into the working of the Aligned Incentive Contract."
7. The CCG issued a refusal notice 8 February 2019. It said that disclosing the requested information *"would be likely to prejudice the provision of advice or the exchange of views and would otherwise prejudice the effective conduct of public affairs."* The CCG said the information is therefore exempt from disclosure under section 36(2)(c) of the FOIA. It considered that the public interest favoured maintaining this exemption.
8. In his request for an internal review, the complainant noted the CCG's reference to section 36(2)(c) and said that the CCG had not provided any arguments to support its apparent reliance on section 36(2)(b)(i) and 36(2)(b)(ii).
9. The complainant has told the Commissioner that the CCG wrote to him on 20 February 2018 to clarify that it was also relying on sections 36(2)(b)(i) and (ii).
10. Following an internal review the CCG wrote to the complainant on 28 February 2019. It said that the front sheet of the report containing the main internal learning from the review process and next steps/actions, and that a minute from a particular meeting could be disclosed. The CCG confirmed that it maintained its position with regard to the remainder of the report. However, as far as the Commissioner is aware, the CCG did not refer to any particular part of the section 36 exemption in its internal review.

Scope of the case

11. The complainant contacted the Commissioner on 18 March 2019 to complain about the way his request for information had been handled.

12. The Commissioner's investigation has focussed on whether the remainder of the report the complainant has requested engages any part of the exemption under section 36, and the balance of the public interest.

Reasons for decision

Section 36 – prejudice to effective conduct of public affairs

13. Section 36(2)(b) of the FOIA says that information is exempt information if, in the reasonable opinion of a qualified person, disclosure would, or would be likely to inhibit, under subsection (i) the free and frank provision of advice or under subsection (ii) the free and frank exchange of views for the purposes of deliberation.
14. In its refusal notice the CCG referred to both advice and exchange of views issues but then went on to confirm it was relying on section 36(2)(c). However, prior to its internal review the CCG confirmed that it was also relying on section 36(2)(b)(i) and (ii).
15. Section 36(2)(c) of the FOIA says that information is exempt information if, in the reasonable opinion of a qualified person, disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
16. This means that section 36(2)(c) can only apply in instances when the envisioned inhibition or prejudice to the effective conduct of public affairs does not concern the giving/receiving of advice or the exchange of views. A public authority may apply both section 36(2)(b) and section 36(2)(c) to information but the envisioned prejudice under section 36(2)(c) must concern something **other than** advice or the exchange of views, which are covered by 36(2)(b).
17. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised, qualified person (QP) for that public authority. The QP's opinion must also be a "reasonable" opinion, and the Commissioner may decide that the section 36 exemption has not been properly applied if she finds that the opinion given is not reasonable.
18. Other than for information held by Parliament, section 36 is a qualified exemption. This means that even if the QP considers that disclosure would cause harm, or would be likely to cause harm, the public interest must still be considered.

19. The CCG appears to have misunderstood somewhat how section 36 should be applied – it indicated it is relying on section 36(2)(c) and section 36(2)(b) but discussed section 36(2)(b) matters only. However because the CCG did subsequently confirm that it is relying on sections 36(2)(b)(i) and (ii) the Commissioner has considered whether the withheld information engages these exemptions, and not whether the CCG can rely on section 36(2)(c).
20. The submission the CCG provided to her comprises: the CCG's record of the QP's opinion; the internal review it sent to the complainant and the information the CCG had released to the complainant (the review cover sheet). It also includes a redacted version of the review report. The CCG explained that the redacted material relates to opinions which, if released, may damage working relationships and which were obtained in the course of presumed confidential conversations with staff members. The matter of the redacted information withheld from the Commissioner is discussed under 'Other Matters'.
21. To determine, first, whether the CCG correctly applied the exemption, the Commissioner is required to consider the QP's opinion as well as the reasoning that informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
 - (i) ascertain who was the qualified person or persons
 - (ii) establish that an opinion was given by the qualified person
 - (iii) ascertain when the opinion was given; and
 - (iv) consider whether the opinion was reasonable.
22. The Commissioner considers that section 36(2)(b)(i) and (ii) concern processes that may be inhibited at the time of the request and in the future, rather than harm arising from the content or subject matter of the requested information itself. The key issue in this case is whether disclosure would or would be likely to inhibit the process of providing free and frank advice or the exchange of views for the purposes of deliberation, in this case deliberation associated a review into the working a particular contract.
23. The Commissioner has considered the record of the QP's opinion that the CCG provided to her. The qualified person in this case was Phil Mettham, the CCG's Accountable Officer, who the CCG has noted as being authorised as the QP under section 36(6)(o)(iii) of the FOIA. The correct section of the FOIA is section 36(5)(o)(iii), not 36(6), but the Commissioner is satisfied that the QP in this case is appropriate.
24. With regard to paragraph 20(ii), the record of the QP's opinion evidences Mr Mettham confirming that, in his opinion, disclosing the requested information would be likely to have the effects set out in

sections 36(2)(b)(i) and 36(2)(b)(ii). Mr Mettham signed the document and dated it 6 February 2019. The Commissioner is therefore satisfied that an opinion was given by the QP and that the opinion was given at the appropriate time; before the CCG issued its refusal notice.

25. The Commissioner has gone on to consider whether the QP's opinion is reasonable. It is important to note that this is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it is a reasonable opinion, and not necessarily the *most* reasonable 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, she must find that the exemption is engaged.
26. In his correspondence to the Commissioner, the complainant has argued that section 36(2) is not engaged for the following reasons. First, given the nature of the information and the timing of this request, the QP's opinion cannot be reasonable. This is because matters discussed in the review report concern lessons learned about previous problems, and do not concern an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice - that has already been provided. The complainant considers that no prejudice or inhibition can therefore arise from disclosing the information.
27. In the complainant's view none of the information would lead to prejudice based on the circumstances at the time of this request (in January 2019) as the review is an analysis of actions taken in the first half of 2018, and which were by then historic. He considers there will be details in the report which are matters of fact, neutral statements, statistical information or background details, and these cannot by their nature be prejudicial to the free and frank exchange of views or the provision of advice.
28. Finally, the complainant does not accept that releasing the information would prevent staff from cooperating in reviews in future. He argues that they are professional people paid and expected to do a professional job. As such the complainant would not expect them to be prevented from expressing their opinions by disclosure of the report.
29. In order for the QP's opinion to be reasonable, it must be clear as to precisely how the inhibition may arise. In her published guidance on section 36 the Commissioner notes that it is in the public authority's interests to provide her with all the evidence and arguments that led to the opinion, in order to show that it was reasonable. If this is not done, then there is a greater risk that the Commissioner may find that the opinion is not reasonable.

30. The record of the QP's opinion evidences that the QP was provided with: a copy of the complainant's request; arguments as to why inhibition would be likely to occur; an argument for the information's release (which is noted under the public interest test); and another factor taken into account, namely that other partners contributed to the review in question.
31. With regard to why prejudice/inhibition would occur, the QP was advised that the review of the AIC approach was conducted peer to peer to support the learning and discussion process; in an attempt to learn lessons and to seek appropriate advice where required. This necessitated honest and frank exchanges and discussion to enable a proper peer to peer review to be undertaken. The QP was advised that if it had been clear that the content of the review would be shared, participants would not have been as open in their discussion.
32. The QP was also advised that the purpose of the review was to advise on whether matters could be dealt with better and whether anything could be learned from the initial stages of the AIC approach. The outcomes of the review would need further discussion and possibly further advice in terms of how to progress matters. It was considered that staff involved in the review would not have contributed in the same meaningful way if they had been aware that their responses and the review outcome would be published; there was a presumption of confidentiality. The QP was advised that without free and frank discussion the CCG would not be able to seek advice on how to progress this different contracting approach.
33. Finally, the record of the QP's opinion in this case evidences that he considers that inhibition would be likely to occur if the withheld information was to be disclosed, rather than would occur. 'Would be likely' imposes a less strong evidential burden than the higher threshold of 'would'.
34. The Commissioner is satisfied that the QP had sufficient appropriate information about the request to enable him to form an opinion on the matter of whether section 36(2)(b)(i) and section 36(2)(b)(ii) were engaged.
35. The Commissioner has noted the complainant's arguments but finds that all the points at paragraph 20 have been satisfactorily addressed. As a result she must find that the QP's opinion is one a reasonable person might hold and that, therefore, the remainder of the lessons learned review document engages section 36(2)(b)(i) and section 36(2)(b)(ii) of the FOIA: section 36(2)(b)(i) because the full report includes advice from the peer organisation and 36(2)(b)(ii) because it includes views and opinions of some of those who contributed to the report.

36. The Commissioner has gone on to consider the public interest arguments.

Public interest test

Public interest in disclosing the information

37. In his complaint to the Commissioner the complainant says that in December 2018 the Care Quality Commission criticised poor working arrangements between local health and care organisations¹. He says disagreements about budget setting appear to have continued into 2019, which in his view indicates that the joint collaborative working that is required under the AIC is unlikely to be effective and that lessons have not been learned.
38. The complainant goes on to say that despite the agreement to go ahead with the AIC from all those concerned, it became clear in July 2018 that the AIC was not working as expected and officials from NHS Hull CCG were asked to examine what had gone wrong.
39. Taking this into account the complainant considers that there are strong public interest arguments for disclosing the information he has requested. These include:
- A duty on the CCG to be open and accountable in its handling of taxpayers' money.
 - A duty on the CCG to be open and accountable in its commissioning of publicly-funded healthcare services for the benefit of local people.
 - A long history of financial failure by the local NHS dating back several decades which has worsened further in recent years.
 - Recent failures which have put the CCG under legal directions from regulators.
 - Expectations that the contract would alleviate pressures and move the CCG out of legal directions if it had met its financial targets, which it has not despite the AIC.

¹ <https://www.cqc.org.uk/news/releases/york-health-social-care-improvements-made-more-work-required-says-cqc-review>

- A full explanation to the public of the latest problems which have increased the CCG's deficit by £6m beyond that originally predicted to £18.6m².
 - Disclosure would allow the public to judge what the CCG and other partners have learned from problems with the previous contract.
 - Proper public scrutiny of what has gone wrong given that local commissioners, the local provider and NHS regulators signed up to the contract.
 - Disclosure would enable the public to judge if the CCGs, local NHS trust and two regulators - NHS England and NHS Improvement - have the capability to make good decisions.
 - Disclosure would shed further light on the quality of joint working between local organisations, particularly in the light of continuing criticisms by the Care Quality Commission; evidence of continuing tension; and the intention of the AIC to incentivise collective action by managing system demand more effectively.
40. The CCG's refusal notice did not address public interest arguments for disclosure. In its internal review, however, the CCG had acknowledged that it has a duty to be transparent and had identified some information falling within the scope of the request that it could release.
41. In its record of the QP's opinion the CCG had noted that all public bodies are expected to be transparent and that there would be a presumption that lessons learned information would be shared with the public.

Public interest in maintaining the exemption

42. In its refusal notice the CCG said that if it was to disclose the lessons learned review into the AIC contract this would be likely to prejudice the free and frank exchange of views and the provision of advice on those views in the future. It said that, in turn, this would impact on the CCG's ability to explore wide-ranging and potentially controversial ideas, many of which would not progress further in any case. The CCG said that this would negatively influence the quality of deliberation and advice, resulting in less informed decision making, and restricting the

² <https://www.valeofyorkccg.nhs.uk/data/uploads/governing-body-papers/2019/03.19-governing-body-ex-item-12.pdf>

development of ideas to take forward. It concluded its public interest argument by stating that the public has an interest in the CCG being able to hold free and frank discussions about matter of relevance to the health services provided in the Vale of York area. It said there is also a public interest in the CCG having a safe space to consider options properly, prior to them being formalised and being subject to the scrutiny and input of the formal decision making process.

43. In its internal review, the CCG referred to disclosure preventing the free and frank exchange of views in the future. It said that the review was not simply a 'point in time' review and that the content of it was as applicable at the point of the internal review, and for the foreseeable future, as it was at the time it was written. The CCG also noted the basis on which the review was undertaken (ie staff co-operating in full believing the process would be one which was confidential), and said that disclosing the review would therefore undermine the confidence of staff to be frank in any similar conversations in the future.
44. The CCG has told the Commissioner that the review cover sheet that it has disclosed summarises the content of the review report without disclosing personal observations and opinions, and that it considers that the public interest in the AIC is met through disclosure of this cover sheet.
45. The CCG has also confirmed to the Commissioner that the review report was written by a third party peer organisation and that comments and opinions in the report referred to sensitive matters. The comments are not attributed but, the CCG says, it would be clear that they were provided by staff from the NHS Trust involved. The CCG told the Commissioner that these staff members provided frank views on the understanding that those views would not be disclosed at a later date. Since the lessons from the review would continue to be applicable to work going forward, the CCG's argument is that there is a public interest in staff still being prepared to participate in the work, and to give open and honest opinions. The follow up work would not be so robust without that level of participation. The CCG has argued that it is also necessary, and in the public interest, for relationships between the parties concerned to be maintained as the review and implementation work continues, at the time of the request and currently. It considers that disclosing the full report into the public domain may damage those relationships.

Balance of the public interest

46. The Commissioner has considered the complainant's and the CCG's arguments. She considers there are stronger arguments for disclosure than the CCG has identified, such as scrutiny of how public funds are

spent, particularly in a period of cuts and austerity, and when the delivery of healthcare is a high priority matter.

47. That said, the Commissioner is satisfied that such wider public interest as there may be in the matter of the CCG's use of an Aligned Incentive Contract is met through the review report summary that the CCG has released, and the fact that a peer review was carried out on how well, or otherwise, the AIC and those organisations concerned with its delivery, had performed.
48. The report summary evidences that there *were* lessons to be learned and the Commissioner is satisfied that, although the review took place some months before the complainant's request, the matter was still ongoing at the time of the request. Parties had contributed sensitive views to the report openly and frankly, and the argument that disclosing the full report might have a 'chilling' effect on the continuing related discussions has merit.
49. The Commissioner has decided that, at the time of the request, the public interest lay in the CCG and its partners having a 'safe space' in which to openly discuss matters associated with the AIC and how financial objectives might best be achieved in the future.

Other matters

50. In correspondence to the CCG on 17 July 2019 the Commissioner requested a submission from the CCG justifying its position, and for a copy of the information it is withholding. The CCG was reluctant to provide the Commissioner with all the withheld information ie it had redacted some information from the review report it provided to her.
51. The CCG described to the Commissioner the information it is withholding from her – the nature of certain opinions in the lessons learned report – and the Commissioner considered that this was sufficient *on this occasion*.
52. The Commissioner reminds the CCG that if she receives an application under section 50 of the FOIA (application for decision by Commissioner), under section 51 she can serve a public authority with an information notice if she reasonably requires any information. In other words the Commissioner expects a public authority to voluntarily provide her with any information she needs to make a decision – including all the information that an authority is withholding – but she can legally require an authority to provide her any information she needs, if necessary.

Right of appeal

53. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

54. 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.
55. 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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