

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 July 2015

Public Authority: 2gether NHS Foundation Trust

Address: Rikenel
Montpellier
Gloucester
GL1 1LY

Decision (including any steps ordered)

1. The complainant has requested the findings of an internal investigation report by 2gether NHS Foundation Trust into a murder on Trust premises as well as emails sent to the Trust's Chief Executive on a range of dates. The Trust withheld the report on the basis of section 31 and the names of the senders of emails on the basis of section 40(2).
2. The Commissioner's decision is that the exemptions are engaged and the public interest favours withholding the information. He requires no steps to be taken.

Request and response

3. On 9 January 2015, the complainant wrote to 2gether NHS Foundation Trust ("the Trust") and requested information in the following terms:
 - *"Please disclose the findings of an investigation carried out by the trust in relation to the murder of Sharon Wall;*
 - *Please disclose copies of all emails sent and received by Shaun Clee on July 9 and July 10, 2014; December 10, 2014, and January 8 and January 9, 2015, in relation to the case."*
4. The Trust responded on 19 February 2015. It stated it had located information within the scope of the request including a report into the findings of its internal investigation and several internal and external emails. The Trust withheld the findings of the report on the basis of

section 31 of the FOIA. Some emails were disclosed but with redactions under section 40(2) and others were withheld on the basis of section 31.

5. Following an internal review the Trust wrote to the complainant on 19 March 2015. It stated that it upheld its decision to withhold the findings of the investigation report on the basis of section 31 and to redact personal information from the disclosed emails on the basis of section 40. However, the Trust reconsidered its position to withhold some emails under section 31 and considered these could now be disclosed. Consequently a further 8 emails were disclosed to the complainant.

Scope of the case

6. The complainant contacted the Commissioner on 23 March 2015 to complain about the way his request for information had been handled.
7. The Commissioner considers the scope of his investigation to be to determine if the section 31 and 40 exemptions have been correctly applied to withhold information within the scope of the request.

Background

8. On 9 July 2014 an employee of the Trust was murdered on the Trust's premises. The Trust launched an internal serious incident investigation into this death. This investigation led to a report, the findings of which are being withheld by the Trust. The murder was also subject to a police investigation and at the time of the request was being investigated by the Health and Safety Executive (HSE) with the potential for a further investigation by NHS England.

Reasons for decision

Section 31 – law enforcement

9. Section 31 of the FOIA states that –

"Information which is not exempt by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice - ...

(a) the prevention or detection of crime,

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)."

10. The purposes specified at subsection 2(c) and (i) are:

"(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

(i) the purpose of securing the health, safety and welfare of persons at work."

11. The Commissioner finds that the use of the word "ascertaining", i.e. determining definitely or with certainty, limits the application of this exemption to those cases where the public authority to which the prejudice is being claimed, has the power to formally ascertain compliance with the law and judge whether conduct has been improper or in breach of the law or any enactments.

12. The Trust's arguments for the use of this exemption centre around the potential prejudice to the HSE's investigation and therefore the potential to ascertain if regulatory action may be taken and steps enacted to secure the health and safety of people at work.

13. The findings of the Trust's report contain its views about the incident and more specifically, the murder weapon and how this came to be in the possession of the offender. The Trust therefore argues that premature disclosure of the findings of its own internal investigation may influence HSE's own investigation and consequently would be likely to prejudice the functions listed in section 31(2)(c) and (i).

14. The Trust has consulted with the HSE on this issue and they have responded and confirmed that:

"HSE's investigation into this incident remains on-going and they are still in the process of gathering information that may be used to establish if criminal offences under the Health and Safety at Work Act 1974 and associated regulations have been committed ... Until such time as HSE have concluded their investigation, neither the NHS or HSE are in a position to decide the relevance of information held by both parties regarding this case. As such, they regard all of the information requested as relevant to their on-going investigation and disclosure at this time would be likely to seriously impact on the outcome of both their investigation and any potential future prosecution, should they decide on this course of action."

15. Given the comments from the HSE, the Trust considers the section 31(2)(c) and (i) exemption to be relevant due to the likelihood of

disclosure of the findings of its internal report having an impact on the HSE's ability to ascertain whether circumstances exist that may result in regulatory action and to ensure the health and safety of staff.

16. The Commissioner accepts that the HSE has a clear function in this regard, as set out in the Health and Safety at Work Act in particular section 20-23 of this Act which provides the HSE with the power to investigate incidents and take enforcement action against those responsible for offence under the Act. The purpose of the HSE's investigation is to determine the exact circumstances surrounding the incident with a view to taking further action and possible prosecution. The Commissioner has therefore gone on to consider whether the prejudice claimed is likely to occur.
17. The Trust has stated it considers there would be a real and significant risk of prejudice if the findings of its report were disclosed. The Trust considers the disclosure of the findings would be likely to cause prejudice to the HSE's investigation which could potentially lead to a prosecution. The Trust further argues that if a prosecution was to occur disclosure of the Trust's findings would be likely to prejudice the outcome of this as the public having access to the Trust's version of events would inevitably lead to the public having a preconceived idea about the roles of the individuals involved in the incident and the events that took place.
18. The Commissioner accepts the general argument that disclosure of the findings of reports into something which is also being independently investigated by other bodies with the view to potentially taking action could have a prejudicial effect on the process of considering prosecutions or the outcome of any proceedings. However, in determining whether the likelihood of prejudice occurring is real and of substance he has considered the timing of the request.
19. The incident which is central to the investigations occurred on 9 July 2014 and the internal investigation report was completed by the time the request was made. However, the HSE has made it clear that its investigation is still ongoing. In this respect the Commissioner accepts that the issue was still 'live' in that even though the Trust has concluded its investigations the HSE had not and it is the potential prejudice to the HSE's functions which is being argued in this case.
20. As the issue was still 'live' the likelihood of disclosure impacting on the HSE's ability to pursue prosecution and to ensure the health and safety of employees at work would remain relatively high.
21. The Commissioner therefore considers that prejudice to the HSE's functions would be likely to occur if the information were to be

disclosed. As he has accepted it may be more difficult for the HSE to pursue any action at the end of its investigation if information were to be disclosed at this stage which may influence the public's perception of the events that took place, this would be likely to impact on the HSEs ability to pursue prosecutions and to ascertain if regulatory action may be necessary as well as ensuring the safety of employees at work.

22. As section 31 is a qualified exemption the Commissioner has gone on to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosure

23. The Trust has acknowledged there is a public interest in disclosing information which may assist the public in understanding how a murder took place on Trust property.
24. The HSE has also recognised there is a need to disclose information to promote the principle of accountability and it is a well-established argument that disclosure will promote transparency which is particularly important in NHS bodies to ensure they are being run efficiently and responsibly.
25. The complainant has echoed this argument by stating that the public should be able to scrutinise statements made by public authorities and can only do this by allowing the public access to the full information held by them. The complainant has pointed out that the Trust in this case has released a statement which provides the headline findings from its investigation but it is not possible to scrutinise this further without seeing the full findings of the investigation.

Public interest arguments in favour of maintaining the exemption

26. The Trust considers the arguments it presented with regards to the potential prejudice are also relevant considerations for the public interest. Regulators should be able to consider bringing criminal proceedings without fear that their prosecution case has already been prejudiced and undermined by disclosure of relevant information into the public domain.
27. HSE has also provided its own arguments to support withholding the information and has reiterated the arguments relating to the prejudice. HSE has stated that disclosure would be likely to prejudice its ability to properly and independently conduct its investigation, assess evidence and consider whether to bring a criminal prosecution. Disclosure would additionally be likely to prejudice the rights of suspects to be tried in criminal court and receive a fair trial.

Balance of the public interest

28. The Commissioner would firstly like to make it clear that he has not received extensive arguments in relation to the public interest beyond those which are also relevant to the potential prejudice. As such, when considering where the balance of the public interest lies in this case he has looked at the general arguments presented and given consideration to the wider public interest in disclosure of this specific information.
29. The Commissioner gives weight to the argument that there is an increasing need for accountability within NHS bodies to ensure they are being appropriately and effectively managed. He also recognises there is a public interest in information being disclosed to allow the public to scrutinise statements made by NHS bodies. That being said, he does not consider that the decision of the Trust to disclose the main findings of its internal investigation necessarily means they should have to release the entire findings of their investigation. In this case the full findings include more detail on aspects of the incident which have not been disclosed publicly and may be relevant to the HSE's investigation.
30. The Commissioner is not minded to accept that disclosing the full findings would increase accountability significantly as it has already publicly disclosed the main findings and its view as to whether it had proper procedures in place and whether the incident was avoidable. Full disclosure of the findings would provide a greater insight into the way but the Commissioner does not consider this would greatly increase accountability so has not apportioned significant weight to this argument.
31. The Commissioner has taken into account the very strong public interest in not undermining the investigation process and the functions of regulators such as the HSE to investigate incidents which may result in criminal proceedings or enforcement action. The public interest is still high in this regard as the HSE investigation is still live and the argument that disclosure would impact on the investigation and the ability of any suspect to receive a fair trial without already being subject to public scrutiny from the premature disclosure of the Trust's findings is still strong and carries weight.
32. The Commissioner has also taken into account the fact that there is media interest in this issue and as such if the Trust released its full findings it is likely that it would end up being widely circulated, making it more difficult for the HSE to conduct its own investigation without prejudice. As a decision by the HSE on whether to instigate proceedings has not been taken the Commissioner considers there is a strong public interest in allowing the HSE to fulfil its statutory functions in relation to

the enforcement of health and safety laws and in ensuring the criminal justice system in relation to this is able to operate effectively.

33. Taking this into account the Commissioner considers that, in all the circumstances of the case, if the Trust were to disclose the findings of its report there would be a real and significant risk to the HSE's ability to carry out its investigation independently and without unwarranted scrutiny and the public interest favours maintaining the exemption.
34. As such the Commissioner accepts that the section 31 exemption is engaged and the public interest favours withholding the information. The Commissioner has therefore now gone on to consider the application of section 40(2) to redact information from the emails which have been released.

Section 40(2) – personal information

35. Section 40(2) of the FOIA provides that information which is the personal data of a third party is exempt if a disclosure of the information would breach any of the data protection principles.
36. The first question which the Commissioner has considered is whether the information is personal data for the purposes of the Data Protection Act 1998 (DPA). Personal data is defined in the DPA as:

"data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller."
37. In this case the information withheld under section 40(2) consists of the names of individuals who are not employees of the Trust and are mostly employees of other third party employers who wrote to the Trust's Chief Executive in the aftermath of the incident. The Commissioner is satisfied this information relates to living individuals and accepts it is personal data as defined by the DPA.
38. Having determined that the information is personal data, the next question which the Commissioner must consider is whether a disclosure of that information would breach any of the data protection principles.
39. The most relevant data protection principle in this case would be the first data protection principle. This requires that information is processed 'fairly and lawfully'. The Commissioner must therefore decide whether a disclosure of the information would be 'fair'.

40. In considering whether disclosure would be fair the Commissioner takes into account the following factors:
- Whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned;
 - The individual's reasonable expectations of what would happen to their information; and
 - Balancing the rights and freedoms of the data subject with legitimate interests.
41. The Commissioner has considered the information redacted under section 40(2) and the fact that the individual would have had no reasonable expectation that information they sent in the aftermath of an incident such as this and the conviction of the offender would be made public.
42. The Commissioner's view is that when considering what information individuals should expect to have disclosed about them a distinction should be drawn as to whether the information relates to the individual's public or private life. In this case the information relates to the individual's work life but with third party organisations. However, in view of the nature and content of the emails the Commissioner fails to see how any individual in these circumstances would reasonably expect information of this type to be placed in the public domain.
43. The Commissioner has next gone on to consider whether the release of the information would cause unnecessary or unjustified harm to the individuals involved. As the emails are of a fairly personal nature and are messages of condolence and/or support it is not unreasonable to consider that disclosure of the identities of the senders would cause some degree of unwarranted distress although the Commissioner acknowledges this would not be high.
44. In relation to the final factor, the legitimate interest in the public knowing this information, the Commissioner does not consider there is any public interest in the release of this information as it is not relevant to the investigation and would not provide any insight into the situation or contribute towards any debate on the matter. The Commissioner does acknowledge however that usually disclosure of information will increase transparency and accountability.
45. In making his decision the Commissioner has considered whether disclosure of the information would lead to a greater infringement of the individual's legitimate right to privacy than is outweighed by the legitimate interest in disclosure. The Commissioner has not been convinced there is any legitimate public interest in disclosure of the

identity of a sender of an email expressing a view on a very emotive subject beyond simply increasing transparency within the public authority. Balanced against this, the Commissioner does consider the disclosure of this information may cause a small degree of unwarranted distress and the contents of the emails themselves have been disclosed.

46. The Commissioner therefore considers that disclosure of this information would be unfair and in breach of the first data protection principle. As such, section 40(2) is engaged and the information is therefore exempt from disclosure.

Right of appeal

47. 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

48. 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.
49. 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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