

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 September 2021

Public Authority: West London NHS Trust
Address: Trust Headquarters
1 Armstrong Way
Southall
UB2 4SD

Decision (including any steps ordered)

1. The complainant has requested information about an investigation that may have occurred as a result of a whistleblowing concern. West London NHS Trust ('the Trust') would neither confirm nor deny whether it held the requested information, citing section 30(3) and 30(2)(b) (investigations and proceedings) of the FOIA.
2. The Commissioner's decision is that West London NHS Trust is entitled to rely upon section 30(3) as a basis for neither confirming nor denying whether it held the requested information.
3. The Commissioner requires the Trust to take no steps.

Request and response

4. On 14 September 2020, the complainant wrote to the Trust and requested information in the following terms:

"Around January 2020, [Redacted] – had raised whistleblowing concerns about patient safety, and had also requested external investigation. He had also mentioned that the team junior consultant was being framed, bullied by the management as a part of that whistleblowing concern and had escalated matters to NHS England.

When were these whistleblowing concerns investigated and by whom? Who were interviewed as a part of this investigation? What was the outcome of this investigation? And what steps did the Trust take as a result of these concerns?"

5. The Trust responded on 12 October 2020. It refused to neither confirm nor deny that it held the requested information citing section 30(3) as its basis for doing so.
6. Following an internal review the Trust wrote to the complainant on 19 December 2020 and upheld its position.

Scope of the case

7. The complainant contacted the Commissioner on 23 December 2020 to complain about the way that their request for information had been handled.
8. The Commissioner considers the scope of her investigation to be to determine if the Trust is entitled to rely upon section 30(3) as a basis for refusing to neither confirm nor deny whether it held the requested information.

Reasons for decision

Neither confirm nor deny (NCND)

9. Section 1(1)(a) of the FOIA requires a public authority to inform a requester whether it holds the information specified in a request.
10. However, there may be occasions whereby complying with section 1(1)(a) would itself disclose information which would be covered by the relevant exemption. In circumstances such as this the public authority may respond by neither confirming nor denying whether it holds the requested information.
11. The decision to use a NCND response will not be affected by whether a public authority does, or does not hold the requested information. The key issue for NCND in most cases will be theoretical considerations about the consequences of confirming or denying whether the information is held.
12. A public authority will need to use the NCND response consistently, over a series of separate requests, regardless of whether or not it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held.
13. The Trust has neither confirmed nor denied whether it holds information within the scope of this request under section 30(3) of the FOIA.
14. To reiterate, the Commissioner does not need to consider whether it holds the information or the disclosure of any requested information that

may be held. The Commissioner need only consider whether the Trust is entitled to NCND whether it holds any information in relation to the request.

Investigations and proceedings

15. Section 30(3) states:

'The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) or (2).'

16. Section 30(2)(b) states:

'Information held by a public authority is exempt information if (b) it relates to the obtaining of information from confidential sources.'

17. Consideration of section 30(2)(b), is a two-stage process. Firstly, the Commissioner must decide if the exemption is engaged. Secondly, as section 30 is a qualified exemption, it is subject to the public interest test. This means the Commissioner must determine if the public interest in maintaining the exemption outweighs the public interest in confirming or denying whether the requested information is held.

Is the exemption engaged?

18. Firstly the Commissioner will consider, if the Trust held information that fell within the scope of the complainant's request, it would fall within the classes specified in section 30(2)(b) of the FOIA.

19. The Commissioner's guidance *'¹Investigations and Proceedings – FOI section 30'* states *'Confidential sources contribute information which is often vital to the investigations, proceedings and the law enforcement activities of public authorities. A confidential source is a person who provides information on the basis that they will not be identified as the source of that information.'*

20. The Commissioner notes the complainant's request includes reference to the alleged 'whistleblowing concerns' and has requested details of any witnesses interviewed as part of the alleged investigation. The Commissioner is satisfied that, if information were held in relation to this

¹ [investigations-and-proceedings-foi-section-30.pdf \(ico.org.uk\)](https://ico.org.uk/investigations-and-proceedings-foi-section-30.pdf)

request, both the whistleblower² and witnesses would fall within the definition of 'confidential sources' as outlined above.

21. Furthermore, the Commissioner's guidance states '*The exemption will not only cover the actual information obtained from confidential sources but also any procedures, including administrative processes, relating to confidential sources. For example, it would capture protocols for handling such sources, reports on their use.*'
22. The Commissioner notes the complainant's request also includes reference to the outcome, and any steps taken as a result of, the alleged investigation. The Commissioner is satisfied that any report or outcome devised using information provided by confidential sources would be covered under the procedures described above.
23. Looking at the type of information covered by the request the Commissioner is satisfied that, if the Trust held information in relation to this request, it would engage section 30(2)(b).

The public interest test

Public interest arguments in confirming or denying whether the requested information is held

24. The Commissioner's guidance states '*In a democratic society it is important that offences can be effectively investigated and prosecuted. However, the public needs to have confidence in the ability of the responsible public authorities to uphold the law and the public interest will be served by disclosures which serve that purpose.*'
25. The Trust acknowledges that it has an obligation to promote accountability and transparency. The Trust recognises that taxpayers, service users and stakeholders all have an interest in how the Trust operates and enacts its processes and procedures.
26. Expanding on this, the Trust recognises that there is a public interest in how it handles internal complaints, specifically how it proactively investigates whistleblowing concerns that may concern patient welfare and safety.

Public interest arguments in neither confirming nor denying whether the requested information is held

² [Whistleblowing for employees: Who to tell and what to expect - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/whistleblowing-for-employees-who-to-tell-and-what-to-expect)

27. The Commissioner's guidance states *'In broad terms, the section 30 exemptions exist to ensure the effective investigation and prosecution of offences and the protection of confidential sources.'*
28. The Trust appear primarily concerned that confirmation or denial may deter whistleblowers in the future. This is because whistleblowing, and cooperation with any internal investigation, is likely to be carried out in circumstances which impart an obligation of confidence, with the expectation that this information is not released into the public domain. The Commissioner is mindful that disclosure of information under the FOIA is, in essence, disclosure to the world at large.
29. The Trust have assigned substantial weight to this argument, indicating that patient welfare and safety are at the root of such concerns and it would not be in the public interest to discourage whistleblowers, or engagement with, any internal investigations into patient safety and welfare. The Trust has explained that failing to address patient safety concerns could lead to severe consequences, including death and suicide in the most extreme of circumstances.
30. The Commissioner's guidance states that *'A vital element of many investigations and proceedings is the intelligence supplied by confidential sources and it is important that section 30 serves to protect these sources so that they are not deterred from cooperating with public authorities.'*

Balancing the public interest

31. In balancing the public interest, the Commissioner has considered the public interest in the Trust confirming or denying that it holds the requested information. She has also considered whether such confirmation or denial would be likely to deter confidential sources from coming forward in the future and, if so, what the potential consequences may be.
32. The Commissioner recognises the importance of the public having confidence in public authorities, including healthcare providers such as the NHS. She considers that public confidence will be increased by allowing scrutiny of internal investigations which may involve revealing whether or not particular actions have been necessary, or are ongoing, in specific cases.
33. However, the Commissioner is mindful of her own guidance as referenced in paragraph 31 above.
34. Confidential sources may be deterred from providing intelligence in relation to internal investigations if they believe they could be subsequently identified through the FOIA. They may fear retribution of some kind, for example retaliation from the individuals whom are the

subject of the complaint or increased difficulty in gaining employment elsewhere.

35. The Commissioner considers the fact that the complainant has named an individual in their request for information is relevant to this case. The complainant may be confident that a whistleblowing concern has been raised but confirmation under the FOIA is confirmation to the world at large.
36. For example, the Trust could easily deny holding the requested information if this complaint has not been investigated. However, the Commissioner accepts that a public authority may need to issue a NCND response consistently, over a series of separate requests, regardless of whether it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held.
37. Key to the balance of the public interest where this exemption is engaged is whether confirmation or denial could have a harmful impact in the future. Clearly it would not be in the public interest to deter whistleblowers from raising concerns relating to patient safety and welfare. This has the potential to create a healthcare system in which malpractice or failings go unchallenged.
38. The Commissioner recognises the Trust's reliance on confidential sources, specifically front line workers, who may witness any failings in patient safety or welfare. The Commissioner considers the protection of confidential sources in these circumstances holds considerable weight and therefore, finds that the Trust is entitled to rely upon 30(3) to neither confirm nor deny that it holds the requested information.

Right of appeal

39. 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

40. 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.
41. 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

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