Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 7 April 2011

Public Authority: **North Lancashire Teaching PCT**
Address: **More Lane Mills**
More Lane
Lancaster
LA1 1QD

Summary

The complainant made a request to North Lancashire Teaching Primary Care Trust (the "PCT") for correspondence between the Chief Executive of the PCT and the Chief Executive of University Hospitals of Morecambe Bay NHS Trust (the "Trust"). The PCT refused to provide this information to the complainant as it stated it was exempt from disclosure under section 31(1)(g) with section 31(2)(j) and that some of the information contained in the correspondence was also exempt under section 40(2) of the Freedom of Information Act 2000 (the "Act"). During the course of the Commissioner's investigation the PCT provided the complainant with some of the requested information. The Commissioner considers that the section 31(1)(g) with section 31(2)(j) exemption was correctly engaged in this case to the remaining withheld information. The Commissioner did not therefore go on to consider the PCT's application of section 40(2).

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. The information requested is for letters between the PCT and the Trust relating to the performance of the Trust.

The Request

3. The complainant made a request to the PCT on 5 August 2010. The request was as follows:

> *"This is a formal FoI request for an electronic copy (no paper letter requested or required in connection with this request) of the letter described as being dated 3.6.10 from Janet Soo-Chung (or possibly William Bingley) to Tony Halsall Chief Executive of UHMB NHS Trust concerning the meeting between Ms Soo-Chung and Mr Halsall which reportedly took place on 1.6.10. This meeting reportedly was arranged to discuss 'service issues at UHMB'. If there is a response to this letter from Mr Halsall or any other UHMB employee or director, I formally request an electronic copy of that as well."*

4. On 3 September 2010 the PCT responded to the request. The PCT confirmed that it held two letters relevant to the request. It explained that it held a letter from Ms Soo-Chung to Mr Halsall dated 3 June 2010 and a letter from Mr Halsall to Ms Soo-Chung dated 14 June 2010 which followed on from the letter of 3 June 2010 and which related to the content of that letter. The PCT stated however that it believed that the information was exempt from disclosure under sections 31(1)(g) with section 31(2)(j), section 36 and section 40(2) of the Act. It provided an explanation as to why it believed the exemptions applied in this case.

5. The PCT explained that it had not at that stage considered the public interest test in relation to its application of section 31(1)(g) with section 31(2)(j) and section 36 to determine whether or not the information could be disclosed. It confirmed that it would consider this and communicate the outcome by 17 September 2010.

6. On 17 September 2010 the PCT wrote to the complainant to explain that it had decided that section 31(1)(g) applied as disclosure would or would be likely to prejudice the PCT's exercise of its commissioning and health services monitoring

functions for 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 pursuant to section 31(2)(j). It stated that it no longer wished to apply section 36 of the Act. In relation to its application of section 31 as set out above, it explained that it had considered the public interest test. It explained that the PCT had decided that the public interest did not favour disclosure of the requested information or part of that information. It set out the factors it had taken into account in coming to this decision.

7. As the complainant was dissatisfied with the response he had received, on 19 September 2010 he asked the PCT to conduct an internal review of its decision.

8. On 15 October 2010 the PCT wrote to the complainant with the result of the internal review it had carried out. It upheld its application of section 40(2) and section 31(1)(g) with section 31(2)(j). As the complainant was dissatisfied with the way his request had been dealt with by the PCT he resubmitted his complaint to the ICO on 21 October 2010 (complaint originally made on 19 September 2010 however internal review had not been completed).

The Investigation

Scope of the case

9. On 21 October 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

- To determine whether the PCT was correct to withhold the requested information.

10. During the course of the Commissioner's investigation the following matters were resolved informally and therefore these are not addressed in this Notice:

- The PCT provided the complainant with a redacted copy of one of the requested letters dated 14 June 2010. The information contained within this letter which was provided to the complainant will not therefore be addressed.

Chronology

11. The Commissioner wrote to the PCT on 12 January 2011 to ask it to provide further submissions in relation to its application of section 31(1)(g) with section 31(2)(j) and section 40(2).

12. On 8 February 2011 the PCT responded to the Commissioner and provided further submissions in relation to its application of section 31(1)(g) with section 31(2)(j) and section 40(2).

13. On 23 March 2011 the Commissioner wrote to the PCT to ask it whether it was willing to disclose information contained within the withheld letter dated 14 June 2010 which was already in the public domain.

14. On 29 March 2011 the PCT disclosed a redacted copy of the letter dated 14 June 2010 which disclosed the information contained within that letter which is already in the public domain.

Analysis

Exemptions

Section 31(1)(g) with Section 31(2)(j)

15. Section 31 (1) states that:

> 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, -
>
> (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)

16. Section 31(2) states that:

> The purposes referred to in subsection (1)(g) to (i) are –
>
> (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.

What is the PCT's Function for the purpose specified at section 31(2)(j)?

17. In this case the PCT has explained that its relevant function for the purpose of section 31(2)(j) is that as the commissioner of healthcare services provided by the Trust, the PCT has a duty to oversee the safe and effective delivery of those services by the Trust, and all other Trusts within its area, in accordance with the contractual terms under which the Trust operates.

18. In order for the exemption to be engaged, the Commissioner requires the function identified by a public authority in relation to section 31(1)(g) to be a function which is specifically entrusted to the relevant public authority to fulfil. The Commissioner is aware that healthcare authorities have specific duties to protect the health and safety of patients from the more obvious and direct risks posed by the healthcare industry. 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".

19. The Commissioner is aware that the PCT is responsible principally for designing and commissioning (arranging and paying for) NHS services to meet the needs of their population. It commissions services from a wide range of NHS and other bodies including the private sector. The Trust is one of the NHS bodies which provides services for the PCT. On the PCT's website it states that,

> *"…NHS North Lancashire is the local healthcare leader. We make sure the health services in North Lancashire meet the health needs of the population, which we do by commissioning the best services at the best value, in strong working partnerships with other organisations and the public. We aim to continue improving the quality and performance of the available services through strong performance management, ensuring that the services delivered are the services you need."*

20. The Commissioner is satisfied that the PCT does therefore have a duty to put and keep in place arrangements for the purposes of monitoring and improving the quality of health care provided by the Trust for the PCT.

Likelihood of prejudice occurring?

21. The PCT has argued that its functions relating to 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, would be likely to be prejudiced in this case. It has argued that if communications between Chief Executives regarding an NHS Trust's provision of services under contractual arrangements were routinely disclosed to the public, this would be likely to prevent individuals from being engaged in free and frank exchanges of correspondence with regard to the monitoring of and provision of healthcare services provided by Trusts under contractual arrangements with commissioning bodies. It stated that this would hinder collaborative working and the speedy resolution of issues as they arise which directly effect the health and safety of patients. It explained that such open exchanges were vital for the effective future working and role of the PCT as a commissioner of health services to ensure that patients obtain the best healthcare services.

22. The Commissioner will first seek to ascertain that the disclosure would be likely to have an impact on the voluntary supply or free flow of information and if so will then seek to determine whether the change in the voluntary supply of information would be likely to prejudice the PCT's function relating to 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, would be likely to be prejudiced in this case.

23. In determining whether the disclosure would be likely to have an impact on the voluntary supply or free flow of information the Commissioner has first considered the content of the withheld information. The Commissioner considers that the letters contain some very open exchanges between the Chief Executive of the Trust and the Chief Executive of the PCT regarding the Trust's performance. Due to the candid nature of the withheld information, the Commissioner considers that this would support the argument that disclosure would be likely to have an impact upon the voluntary supply of information in the future.

24. The Commissioner has also considered the timing of the request in relation to the date of the withheld information. The withheld letters were sent in June 2010 and the request for those letters was made in August 2010. The Commissioner considers that the letters were very current at the time of the request and matters discussed within those letters were still

live at the time of the request. Therefore the concerns raised were still being dealt with at the time of the request, if the requested letters had been disclosed, the likelihood of disclosure impacting upon the PCTs ability to obtain any further information from the Trust would have been relatively high. Therefore due to the timing of the request again the Commissioner considers that this would support the submission that disclosure would be likely to have an impact upon the free flow of information in the future.

25. The Commissioner is not aware of any statutory power that the PCT has to compel Trusts to engage with it in this way. However as the PCT's main function is commissioner of health services in the area, the Commissioner considers that it is in the Trust's interest to engage with the PCT. The PCT commissions services from a wide range of NHS bodies as well as the private sector to obtain the best services for the population it serves at the best value. It is therefore in the Trust's interest to engage with the PCT to ensure that its services are the best at the best value. If the Trust could not provide the level of service required by the PCT it may look to another NHS body or to the private sector instead.

26. Finally the Commissioner has considered the fact that the PCT has explained that the Chief Executive of the Trust did not expect that the requested information would be disclosed. Again the Commissioner considers that this supports the argument that disclosure would be damaging to the free flow of information sharing between the PCT and the Trust in the future.

27. Upon considering the factors discussed in paragraphs 24 to 27 the Commissioner has concluded that disclosure would be likely to have an impact upon the voluntary supply of information.

28. The Commissioner will now consider whether the change in the voluntary supply of information would be likely to prejudice the PCT's function as commissioner of health services.

29. The PCT has argued that if the information is disclosed, information would not be shared as freely between the PCT and Trusts in the future. It has explained that if information is not shared as freely this would hinder joined up working and the speedy resolution of issues as they arise relating to the health and safety of patients. The Commissioner considers that this change in the voluntary supply of information would be likely to adversely affect the working relationship between the PCT and the Trust. The Commissioner considers that this working

relationship is essential to enable the PCT to ensure the patients within its remit are receiving the best NHS care and services possible. If this working relationship were adversely affected by disclosure of the requested information, future issues arising may not be dealt with as expediently and openly between the PCT and the Trust.

30. The PCT has argued that the prejudice would be likely to occur. When considering the likelihood of prejudice the Commissioner is mindful of the Tribunal's views in *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*. In this case the Tribunal confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk." This interpretation followed *R (on the application of Lord) v Secretary of State for the Home Office [2003]*. In that case, the view was expressed that, "Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not." In other words, the risk of prejudice need not be more likely than not, but must be substantially more than remote. In this case the Commissioner is mindful of the open nature of the withheld information, the timing of the request as the matters discussed were still current and the fact that the Trust did not expect that the information would be disclosed. The Commissioner therefore considers that the prejudice claimed would be likely to occur.

31. The Commissioner's conclusion is that section 31(1)(g) with section 31(2)(j) is engaged in this case. He will now go on to consider the public interest arguments.

Public Interest Test

Public interest arguments in favour of disclosing the requested information

32. The PCT has argued that disclosure of the information would:

- Promote transparency, accountability and public participation.
- Enhance the quality of discussions and decision making generally.

33. The Commissioner considers that disclosure would promote openness, transparency and accountability relating to matters

discussed between the PCT and the Trust about the health and safety of patients. The Commissioner considers that this is in the public interest and has given weight to this argument.

34. The Commissioner also considers that disclosure of the information would inform the public and thereby providing the public with greater knowledge of matters discussed between the PCT and the Trust. This in turn would allow the public to enter informed debate and participate more fully in relation to matters discussed between the PCT and the Trust. Again the Commissioner considers that this is in the public interest and has given weight to this argument.

35. The Commissioner also considers that there is a public interest in demonstrating that the quality of services the PCT has paid is generating value for money.

Public interest arguments in favour of maintaining the exemption

36. The PCT has argued that:

- The content of the information does not raise significant issues of concern which would justify the public knowing about the issues being raised e.g. significant health and safety issues.
- The information does not raise issues relating to the expenditure of public money.
- The information is recent and matters are ongoing.
- The information arises as part of the continuing commissioning and monitoring role of the PCT for which the need to ensure the free and frank exchange of views continues.
- The nature of the information is such that its effect on the delivery of healthcare may be unclear – the information relates to obligations and targets imposed by the commissioning body with regard to the provision of healthcare services. It suggested that information might be taken out of context and might result in unsubstantiated public concerns regarding the Trust's services.
- There is a need for public bodies to be able to debate issues internally away from public scrutiny.

- Disclosure may hamper the quality of future discussions.
- Disclosure would put unnecessary concerns into the public domain.

37. The Commissioner has considered the arguments raised by the PCT. The Commissioner has given particular weight to the argument that at the time of the request the information was very recent and the matters raised were ongoing. The Commissioner considers that at the time of the request matters were live and ongoing and that there is a strong public interest in the PCT and the Trust being able to deal with such matters candidly and expediently without external scrutiny. As the matters were recent at the time of the request the Commissioner considers that it is more likely that disclosure would have a negative impact on the candour of information sharing, debate and discussion between the PCT and the Trust. He considers that this would be in relation to the matters raised that were live at the time of the request as well as any future matters raised between the PCT and the Trust or other bodies with which it works.

38. In relation to the PCT's argument that the information may be taken out of context, the Commissioner gives little weight to this argument as the PCT is able to provide any useful background information alongside the disclosure to put it into context. However the Commissioner has given weight to the argument that disclosure would put unsubstantiated claims into the public domain. The Commissioner considers that the PCT raises matters with the Trust as an initial approach to investigate where things are going right, where things are going wrong, and to find speedy resolution to improve any areas in which this is required. The Commissioner does not consider that it is in the public interest to release information raised between the PCT and the Trust at an early stage as this gives the Trust an opportunity to respond to the PCT and put measures into place to put right any areas of potential concern.

39. In terms of the PCT's argument that the information does not raise issues relating to the expenditure of public money, the Commissioner does not agree due to his considerations set out at paragraph 35 above.

Balance of the public interest arguments

40. The Commissioner has considered the public interest arguments in favour of disclosure raised by the PCT. He has given due weight to the argument that disclosure would

promote openness, transparency and accountability. He also considers that disclosure would allow the public to be able to enter into more informed debate and discussion relating to issues raised within the requested information. Furthermore he considers disclosure would show whether or not the PCT is obtaining value for money in the services it commissions to the Trust.

41. The Commissioner has also considered the public interest arguments in favour of maintaining the exemption raised by the PCT. He has given significant weight to the timing of the request and the impact that this would have on the openness of discussions between the PCT and the Trust, both current and future. He has also given weight to the fact that the information contains matters raised between the PCT and the Trust at an initial stage to work out what was going right, what was going wrong and where improvements could be made.

42. In this case the Commissioner considers that the public interest arguments in favour of maintaining the exemption outweigh the public interest arguments in favour of disclosure. The Commissioner therefore considers that section 31(1)(g) with section 31(2)(j) was correctly engaged in this case.

43. As the Commissioner has found that section 31(1)(g) with section 31(2)(j) was correctly engaged in this case he has not gone on to consider the application of section 40(2).

The Decision

44. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- The PCT was correct to withhold the requested information under section 31(1)(g) with section 31(2)(j).

Steps Required

45. The Commissioner requires no steps to be taken.

Right of Appeal

46. 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,
    Arnhem House,
    31, Waterloo Way,
    LEICESTER,
    LE1 8DJ

    Tel: 0845 600 0877
    Fax: 0116 249 4253
    Email: informationtribunal@tribunals.gsi.gov.uk.
    Website: www.informationtribunal.gov.uk

47. 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.

48. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 7th day of April 2011

Signed ……

Pamela Clements
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Time for compliance

Section 10 provides that -

"(1)Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

(2)Where the authority has given a fees notice to the applicant and the fee is paid in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.

(3)If, and to the extent that—

(a)section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b)section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

(4)The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working

day following the date of receipt, as may be specified in, or determined in accordance with, the regulations.

(5)Regulations under subsection (4) may—

(a)prescribe different days in relation to different cases, and

(b)confer a discretion on the Commissioner.

(6)In this section—

- "the date of receipt" means—

  (a)
  the day on which the public authority receives the request for information, or

  (b)
  if later, the day on which it receives the information referred to in section 1(3);

- "working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

Law Enforcement

Section 31 provides that –

"(1)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—

(a)the prevention or detection of crime,

(b)the apprehension or prosecution of offenders,

(c)the administration of justice,

(d)the assessment or collection of any tax or duty or of any imposition of a similar nature,

(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,

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

(h)any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf

of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or

(i)any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.

(2)The purposes referred to in subsection (1)(g) to (i) are—

(a)the purpose of ascertaining whether any person has failed to comply with the law,

(b)the purpose of ascertaining whether any person is responsible for any conduct which is improper,

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

(d)the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,

(e)the purpose of ascertaining the cause of an accident,

(f)the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,

(g)the purpose of protecting the property of charities from loss or misapplication,

(h)the purpose of recovering the property of charities,

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

(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.

(3)The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1)."