

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 14 April 2014

**Public Authority:** Cardiff and Vale University Health Board  
**Address:** University Hospital of Wales  
Heath Park  
Cardiff  
CF14 4XW

#### **Decision (including any steps ordered)**

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1. The complainant requested the minutes of a professional strategy meeting that took place on 13 July 2011. Cardiff and Vale University Health Board ('the Health Board') initially refused to confirm or deny whether it held the requested information by virtue of section 40(5). It later indicated that it was relying on section 40(2) as the basis to refuse to disclose the requested information. During the course of the Commissioner's investigation, the Health Board also sought to rely on sections 31(1), 38(1) and 41(1) in relation to the requested information. The Commissioner's decision is that the Health Board was entitled to rely on section 31(1)(g) with section 31(2)(j) to withhold the information and the public interest in favour of maintaining the exemption outweighs the public interest in disclosure. The Commissioner does not require any steps to be taken.

#### **Request and response**

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2. On 30 June 2013, the complainant wrote to the Health Board and requested information in the following terms:

"Can you please send me a copy of the minutes of the professional strategy meeting that took place on the 13 July 2011 at the UHW. The meeting was between UHB safeguarding team, Human Resources and police representatives".

3. The Health Board issued a refusal notice on 17 July 2013 stating that it could neither confirm nor deny whether it held the requested information by virtue of section 40(5) of the FOIA.
4. On 22 July 2013 the complainant wrote to the Health Board providing further information about the meeting in question. He stated that he disputed that the information requested was personal data as defined in the Data Protection Act 1998 ('DPA') as it did not relate to a living individual.
5. Following several exchanges between the complainant and the Health Board, the Health Board issued a revised response on 2 September 2013 stating that it no longer wished to rely on section 40(5) as the complainant had knowledge that a meeting had taken place. The Health Board stated that it considered the information requested to be exempt under section 40(2) of the FOIA.
6. The complainant wrote to the Health Board on 4 September 2013 expressing his dissatisfaction with its handling of his request and the delays experienced. He indicated that the Health Board should consider whether any personal data could be redacted from the information requested.
7. The Health Board provided the outcome of its internal review on 10 September 2013 and upheld its decision that the information requested was exempt under section 40(2) of the FOIA.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 16 September 2013 to complain about the way his request for information had been handled.
9. During the course of the Commissioner's investigation, the Health Board stated that, on review, as well as section 40(2) applying to parts of the information requested it also considered the following exemptions to apply:
  - Section 31(1)(g), together with sections 31(2)(b), (c), (d) (i) and (j) to all of the information requested.
  - Section 38(1)(a) to parts of the information requested.

- Section 41(1) to parts of the information requested
10. The scope of the Commissioner's investigation is to determine whether the information requested on 30 June 2013 should be disclosed or whether the Health Board was correct in relying on any of the exemptions claimed.

## **Reasons for decision**

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### **Section 31 – Law enforcement**

11. Section 31 provides a prejudice-based exemption which protects a variety of law enforcement interests. Consideration of this exemption is a two-stage process. Firstly, in order for the exemption to be engaged it must be at least likely that disclosure would prejudice one of the law enforcement interests protected by section 31 of FOIA. Secondly, the exemption is subject to a public interest balancing test. The effect of this is that the information should be disclosed if the public interest favours this, even though the exemption is engaged.
12. Having considered its submissions and viewed the withheld information, (marked by the Health Board with which exemptions it considers applicable), the Commissioner understands that the Health Board considers section 31(1)(g) applies to all the withheld information.
13. Section 31(1)(g) states:
- "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)".
14. Subsection (2) lists ten purposes (a) to (j). Of these ten purposes, the Health Board is citing the following purposes:
- 31(2)(b) - the purpose of ascertaining whether any person is responsible for any conduct which is improper.
  - 31(2)(c) – the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.
  - 31(2)(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.

- 31(2)(i) – the purpose of securing the health, safety and welfare of persons at work.
- 31(2)(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.

15. To engage the exemption at section 31(1)(g) of FOIA a public authority must:

- identify the public authority that has been entrusted with a function to fulfil one of the purposes listed in subsection (2);
- confirm that the function has been specifically designed to fulfil that purpose, and
- explain how the disclosure would prejudice that function.

16. The Commissioner's guidance on the application of section 31<sup>1</sup> states that the functions referred to in section 31(2) must be imposed by statute and that the Commissioner is unlikely to accept that the exemption is engaged unless legislation specifically imposes a positive duty on the public authority to fulfil the relevant purpose. Therefore, in order to engage the exemption in this case, the Health Board must identify that it has been entrusted with a function to fulfil the purpose of ascertaining whether a person has failed to comply with the law or is responsible for any conduct which is improper. It must then confirm that the function has been specifically designed to fulfil that purpose, and finally, it must demonstrate how the disclosure of the withheld information would, or would be likely to, prejudice either of those functions.

17. The Commissioner's guidance on section 31 explains the meaning of the word 'ascertain' in the context of this exemption. It states:

"To 'ascertain' is to make certain or prove. In this context it means that the public authority with the function must have the power to

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[http://www.ico.org.uk/for\\_organisations/guidance\\_index/~/media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/law-enforcement-foi-section-31.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/law-enforcement-foi-section-31.ashx)

determine the matter in hand with some certainty. The public authority must not only be responsible for the investigation but it must also have the authority to make a formal decision as to whether that person has complied with the law. This could include taking direct action itself such as revoking licences or imposing fines, or it could involve taking a formal decision to prosecute an offender”.

18. Due to the circumstances of this case and the content of the withheld information, the level of detail which the Commissioner can include in this notice about the Health Board’s submissions to support its position in respect of its application of this exemption and the Commissioner’s consideration of those arguments is limited. This is because inclusion of any detailed analysis is likely to reveal the content of the withheld information itself. The Commissioner has therefore produced a confidential annex which sets out in detail his findings in relation to the application of the exemption. This annex will be provided to the Health Board but not, for obvious reasons, to the complainant.

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

19. The withheld information comprises the minutes of a meeting to discuss a situation that had arisen involving a patient’s allegation of improper behaviour against a member of staff.
20. The Health Board confirmed that it has a statutory duty to protect the health and safety of patients against risks posed by the delivery of health care services. This is set out within section 45(1) of the Health and Social Care Act 2003 and places a duty on all NHS bodies to:  
  
“put in place arrangements for the purpose of monitoring and improving the quality of health care provided by and for that body”.
21. The Commissioner accepts that this function places a duty on the Health Board to protect the health and safety of patients against risks arising out of, or in connection with, the actions of its employees. Therefore, he is satisfied that the Health Board performs a relevant function for the purpose of section 31(1)(g). The Commissioner has gone on to consider whether that function would be likely to be prejudiced if the Health Board were to disclose the withheld information.
22. The Health Board has argued that its function to protect the health and safety of patients against risks arising out of, or in connection with, the actions of its employees would be likely to be prejudiced as disclosing the information would make future investigations more difficult to conduct.

23. In order to ensure a robust and fair investigation, the Health Board considers it important that individuals involved in the process need to be assured they are able to conduct discussions in a free and frank manner with the expectation that the detail will remain confidential, at least until such time as any resulting actions, such as formal proceedings, commence. When discussing highly sensitive issues with partner organisations, as in this case, the Health Board considers there is a need for a private or safe space to ensure a free flow of information between the parties to fully explore cases without the fear that half formed opinions would be placed in the public domain. The Health Board considers that the confidential, free discussion with partner agencies ensures that appropriate, fair and correct decisions can be made after due consideration of all the relevant facts and information. Without this safe space to discuss such matters, the Health Board considers that there would be a prejudicial effect on future investigations as partners may not fully engage in the same manner.
24. In addition, the Health Board considers that disclosure of the information requested would have a prejudicial effect on patients raising concerns about their treatment in the future for fear that information about their concerns would be placed into the public domain. In this case, the Health Board considers that disclosure of the withheld information would be likely to cause psychological distress and harm to the patient who made the allegations. Due to the sensitive nature of the information the Health Board is of the view that disclosure would re-open a very distressing situation for the patient involved. In addition, the Health Board considers that disclosure would be likely to cause distress and harm to the family members of the member of staff against whom the allegations were made as they may not be aware of the exact nature and extent of the allegations in question.
25. The Health Board argued that disclosure would be likely to deter staff from participating in future investigations which would also impact on its ability to conduct such investigations in the future. The Health Board considers it essential that it is able to satisfy patients, service users, partners and staff that it can be relied on not to disclose confidential and highly sensitive information to the world at large.
26. The Health Board accepts that there is a greater likelihood that disclosure of information relating to ongoing investigations would have a detrimental effect on its ability to gather the necessary information required to complete a robust and fair investigation. The Health Board acknowledges that the prejudice test relates to the circumstances that exist at the time of a request is received. However, the situation in this case is somewhat unusual in that the member of staff against whom the allegations were made passed away before the allegations were fully

investigated and a conclusion reached. This was prior to the request being submitted.

27. The withheld information relates to a very early stage in the investigation process. As such, the Health Board does not consider that disclosure would be likely to prejudice an investigation into the particular case in question as there was no on-going investigation at the time of the request and no further action could be taken in relation to the accused. However, the Health Board contends that disclosure of the withheld information would set a precedent for future requests seeking release of information relating to investigations whilst they are still at a preliminary stage. The Health Board believes that disclosure would prejudice its investigation processes in any future case, and potentially the outcome of any investigation.
28. In order to engage the exemption under section 31(1)(g) with section 31(2)(j) of the FOIA the Health Board must be able to demonstrate prejudice which is real, actual or of substance, to show some causal link between the potential disclosure and the resulting prejudice and to show that the prejudice is at least likely to occur. The Commissioner is mindful that in this case he is considering whether disclosing the withheld information would harm the Health Board's ability to protect the health and safety of patients in the future due to individuals being reluctant to come forward as witnesses, the detrimental effect on the free flow of information between partner organisations, and the reluctance of its own staff from participating in future investigations.
29. The Commissioner considers that the information obtained from witnesses in this case is of a particularly sensitive nature. Based on the content of the withheld information in this case, the Commissioner considers it likely that witnesses would be unwilling to make statements in the future if this particular information were to be disclosed. Therefore, the Commissioner accepts that disclosing the information in this case would be likely to prejudice the Health Board's ability to protect the health and safety of patients from the actions of its employees by deterring witnesses from coming forward.
30. The withheld information in this case can be fairly categorised as frank and open exchanges about a particularly sensitive matter and which relate to an early stage in the investigation process. As the accused passed away before the allegations were fully investigated and a conclusion reached, disclosure of the withheld information would put into the public domain information about unsubstantiated allegations. The Commissioner considers that, based on the content of the withheld information, there was a strong expectation on the part of those involved that the information would not be published. He therefore accepts that disclosure would be likely to have a negative impact on the

free flow of candid information between the Health Board and partner organisations in the future. The Commissioner also recognises the Health Board's argument that if the information were disclosed it is likely there would be a precedent effect on the voluntary supply and free flow of information between itself, witnesses and partner organisations in the future.

31. The Commissioner considers that there is a real and significant risk that disclosure would have a negative impact on the voluntary supply and free flow of candid information. He also considers that this is the case in relation to any issues raised within the withheld information and in relation to any issues that might arise in future due to the precedent effect of disclosure of the withheld information. Taking into account the subject matter, the content of the withheld information and the Health Board's representations, the Commissioner accepts that disclosure would be likely to prejudice the Health Board's ability to protect persons other than persons at work against risk to health and safety arising out of or in connection with the actions of persons at work. Therefore the Commissioner considers that section 31(1)(g) with section 31(2)(j) is engaged in relation to the withheld information.

### **Public interest test**

32. The exemption under section 31(1)(g) with section 31(2)(j) of the FOIA is qualified which means that the information in question should only be withheld where the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **Public interest arguments in favour of disclosure**

33. The Health Board acknowledges that there is a general public interest in disclosure of information that promotes accountability and transparency in its actions. It also accepts that disclosure of information relating to investigations would provide the public at large with assurances that the Health Board takes its responsibilities towards protecting the welfare of its patients seriously. Disclosure would also demonstrate that the Health Board has adequate processes in place to deal with situations that arise following allegations against staff and to provide assurances that actions are taken as swiftly as possible.
34. The complainant considers that the public has a right to know what strategy the Health Board employs when allegations are made against its staff. He considers that disclosure would promote accountability and transparency in the actions it took in this case as well as bringing to light information affecting public safety.

### **Public interest arguments in favour of maintaining the exemption**



35. The Health Board considers that the following factors weigh in favour of maintaining the exemption in this case:

- The sensitivity of the withheld information. Disclosure could cause distress and upset to the individuals named in the withheld information, their families and other individuals associated with them.
- There would be an expectation by those directly and indirectly involved that details surrounding alleged incidents and resulting investigations would only be disclosed where absolutely necessary and would not be put into the public domain at least until such time as any investigation had been concluded. In addition, on conclusion of investigations the expectation in relation to any disclosure is that only a limited, restricted amount of information would ever be placed in the public domain.
- The individual against whom the allegations were made passed away before the allegations were fully investigated. As such, disclosure would put information about unproven allegations into the public domain.
- The need for a "safe space" for public bodies to formulate and debate issues of such a sensitive nature away from public scrutiny, particularly where the information relates to early stages of an investigation, as in this case.
- Disclosure is likely to deter patients from raising concerns in the future, which would lead to the likelihood of incidents going unreported. This would have a detrimental effect on the Health Board's ability to protect persons other than persons at work against risk to health and safety arising out of or in connection with the actions of persons at work.
- Disclosure would have a negative effect on the voluntary and free flow of information between the Health Board and partner organisations which would prejudice the relevant investigatory processes of the organisations involved.
- Disclosure would set a precedent for the handling of similar requests in the future, where investigations are ongoing. Disclosure of information about such preliminary discussions would be likely to prejudice any investigations which the police or the HCPC would be required to undertake on a criminal or regulatory basis.

### **Balance of the public interest test**

36. The Commissioner considers that the public interest arguments in favour of withholding the information are very strong in this case.
37. In reaching a view on where the public interest lies, the Commissioner has taken into account the nature of the withheld information in this case which is of a highly sensitive nature. The Commissioner has afforded some weight to the length of time since the information was produced (July 2011), and the fact that at the time of the request the particular investigation was not on-going and no further action could have been taken, as the individual against whom the allegations had been made had passed away. However, on the other hand, the Commissioner considers that there is a strong element of confidentiality associated with the withheld information, which relates to a very early stage of the investigation. The Commissioner considers that this principle of confidentiality should remain even after the death of the individual concerned. This is because disclosure into the public domain of unsubstantiated allegations before any decision had been taken on those allegations would unreasonably tarnish the reputation of the individual and would clearly be upsetting to those closely associated with them.
38. The Commissioner has afforded particular weight to the precedent effect that disclosure would have on communications between the Health Board and partner organisations. He also considers that disclosure would deter individuals in the future from raising concerns about their treatment with the appropriate body. This would clearly not be in the public interest and would be likely to have a significant impact on the Health Board's function to protect persons against risks to health and safety arising out of or in connection with the actions of persons at work.
39. For the reasons outlined above, on the particular facts of this case and taking into account the nature of the withheld information, the Commissioner considers that the public interest arguments in favour of maintaining the exemption outweigh the public interest arguments in favour of disclosure.
40. As the Commissioner is satisfied that the Health Board has correctly applied section 31(1)(g) with section 31(2)(j) to the withheld information, he has not gone on to consider the other exemptions claimed.

## Right of appeal

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41. 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: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

42. 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.
43. 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 .....**

**Anne Jones**  
**Assistant Commissioner**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**