

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 March 2015

Public Authority: Monitor

Address: Wellington House, Waterloo Road
London SE1 8UG

Decision (including any steps ordered)

1. The complainant has requested information about South London and Maudsley NHS Foundation Trust. Monitor is withholding the information, which it says is exempt from disclosure under section 21 (information accessible by other means), section 33 (audit functions), section 40 (personal information) and section 41 (information provided in confidence) of FOIA.
2. The Commissioner's decision is that Monitor has correctly applied section 21 and section 33 to the information it has withheld. He does not require Monitor to take any further actions.

Request and response

3. On 7 October 2014 the complainant wrote to Monitor and requested information in the following terms:

"... This, then, leads me to request copies of the external reports that prompted the investigation.

As you say, the investigation is closed and I request a copy of the external review under the Freedom of Information Act."

4. Monitor responded on 30 October. It treated the request as a request for two external reviews concerning how South London and Maudsley NHS Foundation Trust ('the Trust') was organised and run.

5. Monitor withheld information relating to the second review (carried out by Deloitte), citing the exemption under section 21 of the FOIA. Monitor withheld information relating to the first review (carried out by KPMG), citing the exemptions under sections 33, 40 and 41.
6. Following an internal review, Monitor wrote to the complainant on 9 December. It maintained its original position.

Scope of the case

7. The complainant contacted the Commissioner on 9 December 2014 to complain about the way his request for information had been handled.
8. The complainant is not satisfied that Monitor has told him that a copy of the Deloitte review is publicly available at the Trust and that he can view this element of the information there, in person. The complainant also considers that Monitor has not given sufficient weight to the public interest arguments for disclosing the information withheld under sections 33, 40 and 41.
9. The Commissioner initially focussed his investigation on Monitor's application of sections 21 and 33 to the withheld information. If necessary he was prepared to go on to investigate its application of section 40 and 41.

Reasons for decision

SECTION 21

10. Section 21 of the FOIA says that information is exempt from disclosure if it is reasonably accessible to the applicant by other means.
11. The information that Monitor is withholding under this exemption is a review report (dated Jun 14) that the Trust commissioned from Deloitte, following a separate review by KPMG (discussed at §25-§26). Monitor has told the Commissioner that the Trust has confirmed that it holds a copy of the Deloitte review and that it is available for the complainant to inspect at its offices, at a mutually convenient time. No payment is required.
12. Monitor says it has provided the complainant with the Trust Secretary's contact details and it has noted that the complainant is based approximately seven miles from the Trust's offices. Monitor has therefore concluded that this element of the information is reasonably

accessible to the complainant by other means and is therefore exempt under section 21.

13. In his guidance on section 21, the Commissioner explains that subsection (1) describes the fundamental principle underlying this exemption. This is that, in order to be exempt, information must be reasonably accessible '*to the applicant*'. Unlike consideration of most other exemptions in the FOIA, this allows a public authority to take the individual circumstances of the applicant into account. In effect a distinction is being made between information that is reasonably accessible to the particular applicant and information that is available to the general public. In order for section 21 to apply there should be another existing, clear mechanism by which the particular applicant can reasonably access the information outside of the FOIA.
14. An assessment of whether the section 21 exemption can be successfully applied will be dependent on whether or not requested information is reasonably accessible to the particular applicant who requested it. Information is only reasonably accessible to the applicant if the public authority:
 - knows that the applicant has already found the information; or
 - is able to provide the applicant with precise directions to the information so that it can be found without difficulty. When applying section 21 in this context, the key point is that the authority must be able to provide directions to the information.
15. In this case, the information is available by inspection at the Trust's offices. Monitor has confirmed with the Trust that the information is available there and has consequently directed the complainant to the Trust. It has also provided the complainant with the Trust Secretary's contact details so that he can arrange a convenient date and time to inspect the information.
16. The Commissioner does not consider the distance of seven miles between the Trust's offices and the complainant's base to be excessive, particularly in south London with its excellent public transport links. And he is not aware of any particular personal circumstances that would prevent the complainant from using their own or public transport to visit the Trust's office.
17. The Commissioner is therefore of the view that this element of the requested information is reasonably accessible to the complainant by other means, and is therefore exempt from disclosure under section 21 of the FOIA.

SECTION 33

18. Section 33(1)(b) says

“This section applies to any public authority that has functions in relation to -

(b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.”

19. Section 33(2) says that information held by a public authority to which this section applies is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1).
20. Section 33 is a qualified exemption which means the public authority must apply the public interest test to the requested information.
21. The information Monitor is withholding under this exemption is a review of the Trust's governance arrangements that Monitor commissioned KPMG to carry out.
22. Monitor has explained its function to the Commissioner. Monitor is the sector regulator for health services in England. One of its responsibilities under the Health and Social Care Act 2012 is to licence providers of health services, including NHS Foundation trusts. Its Provider Regulation team performs this role and, in order to carry it out efficiently, the team focuses on building strong and effective relationships with these providers.
23. The Provider Regulation team can begin a formal investigation at any stage but in most cases the team engages with the provider to seek further information before deciding whether to initiate an investigation or exercise any statutory powers. Monitor has told the Commissioner that communications with licensees frequently touch on sensitive issues and are generally treated as confidential. However, if it commences an investigation, or takes enforcement action, it publicises the reasons on its website and by press release.
24. Having considered this explanation, the Commissioner is satisfied that Monitor undertakes the function at section 33(1)(b) – it examines the economy, efficiency and effectiveness with which providers of health services use their resources in discharging their functions. He has gone on to consider whether disclosing the requested information would, or would be likely to, prejudice the exercise of any of Monitor's functions in relation to any of the matters referred to in subsection 33(1).

25. Monitor has told the Commissioner that its Provider Regulation team commissioned the KPMG review as part of its Annual Planning Review (APR) of the Trust. The APR process is the process by which Monitor reviews NHS foundation trusts' forward plans. It allows Monitor to consider and address whether NHS foundation trusts are using resources to discharge their functions efficiently and effectively. The APR process relies on NHS foundation trusts being open about their plans and providing detailed information which is not in the public domain.
26. The KPMG review was announced on Monitor's website. The investigation was subsequently closed in light of the steps the Trust took to address the issues that had been raised. Monitor's decision – that no further regulatory action was necessary and that the investigation could be closed – was also published on its website. The KPMG review itself (dated Oct 13) has not been published.
27. Monitor says that disclosing this information *would be likely to* have a prejudicial effect on the exercise of its functions. This is the lower threshold and means that even if there is below a 50% chance, there must be a real and significant likelihood of prejudice occurring. The likelihood of prejudice arising must be decided on the facts of each case.
28. When considering the likelihood of prejudice, the Commissioner follows a three-step test:
 - Has the public authority identified a prejudicial outcome which is inherent in the exemption in question?
 - Is that prejudicial outcome insignificant or trivial such that the exemption cannot be relied upon?
 - Would the prejudicial outcome be likely to arise?

Has the public authority identified a prejudicial outcome which is inherent in the exemption in question?

29. Monitor has explained that KPMG's primary source of information in preparing the review was internal information provided, and representations made to them, by the Trust's management – through, for example, one-to-one discussions. Monitor argues that disclosing the review could potentially make management teams of NHS foundations trusts less candid and open in supplying information to help Monitor in its APR and similar processes. This is because they would have a reasonable expectation that information provided may be disclosed to the public. Any disclosure which results in management teams being less frank and candid would be likely to delay and inhibit Monitor's performance of its regulatory functions.

30. Monitor also argues that disclosing the KPMG review would adversely affect Monitor's ability to receive frank, candid and helpful views and advice from expert consultants who undertake work to help it perform its regulatory functions. KPMG did not have any expectation that the review would be published and disclosing it would be likely to make KPMG, or other consultants, more guarded in the views they express. This loss of candour would be likely to lead to reviews that are of poorer quality and less effective in helping Monitor to examine NHS foundation trusts' systems and processes.

Is that prejudicial outcome insignificant or trivial such that the exemption cannot be relied upon?

31. Monitor argues that disclosing KPMG's review would be likely to have a prejudicial effect on the exercise of its functions because it would be likely to deter individuals from speaking frankly in the course of future reviews that Monitor undertakes. The Commissioner does not consider the prejudicial outcome described as insignificant or trivial. Less free and frank communication with its providers could erode Monitor's effectiveness as a regulator. This, in turn, could impact on its overarching duty to protect and promote the interests of people in England who use health services.

Would the prejudicial outcome be likely to arise?

32. As at §27, Monitor argues that disclosure 'would be likely' to give rise to the prejudicial outcome described in the exemption. The Commissioner has therefore looked at the lower threshold of likeliness when he has considered Monitor's application of the audit exemption in this case.
33. In order to analyse the merits of Monitor's assertions as to likely prejudice, the Commissioner has first considered whether disclosure would, as it argues, have an impact on the voluntary supply or free flow of information. If this is the case, the Commissioner has considered whether such a change in the voluntary supply of information would be likely to give rise to the prejudice to its audit function.

Would disclosure have an impact on the voluntary supply/free flow of information?

34. In examining this point, the Commissioner has looked at:
- the content of the information
 - whether it has any statutory powers to compel the supply of

- information
- any incentives which might encourage third party engagement; and
 - whether third party or parties would consider disclosure to be damaging.
35. Having had sight of it, the Commissioner is satisfied that the review – of governance arrangements – concerns the “examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions”. (The term ‘resources’ is not limited to financial resources but includes staff, premises, equipment.) He is satisfied that it is information that is at the heart of the audit process in question. He also notes that review took place comparatively recently.
36. Monitor has a statutory responsibility for licencing providers of health services under the Health and Social Care Act 2012 and with this comes a range of statutory enforcement powers that give it the ability to intervene formally in certain circumstances. Although Monitor has not set out any statutory power that it could call on to compel parties to co-operate, it has said it prefers to rely on building strong and effective relationships with health service providers in order to undertake its regulatory functions.
37. Regarding incentives that might encourage third party engagement, the Commissioner considers that, as a general principle, it would be in the interests of any of the parties to engage in a review process that has the ultimate aim of improving health services for the people who use them.
38. Reading the withheld information, the Commissioner is satisfied that the review has relied in part on free and frank contributions from participants. He notes that Monitor has also applied the exemption at section 40 (which protects against the unfair disclosure of personal data) to some of the material. The Commissioner recognises that it may not be easy for the public to identify any individuals from the review, even if names or other personal data is redacted. It may even be difficult for those closely related to the review to identify individuals such that the provisions of section 40 cannot be said to apply.
39. However, individuals may still be reluctant to be forthcoming in future reviews because of a reasonable concern that colleagues could speculate (however, incorrectly) as to which individual made what contribution to the review. The expectation of confidentiality would be eroded such that the audit process would be undermined.
40. In light of the above, the Commissioner is satisfied that disclosing the

withheld information would have an impact on the voluntary supply of information to Monitor, in similar circumstances.

Would a change in the voluntary supply of information be likely to give rise to prejudice to the public authority's audit function?

41. The Commissioner accepts that a review, such as the one carried out by KPMG, can best be progressed when all relevant parties supply information and comment voluntarily and promptly. The Commissioner is therefore satisfied that a change in the voluntary supply of information would be likely to prejudice Monitor's audit function. Consequently, the Commissioner is satisfied that the prejudicial outcome that Monitor has described is likely to arise.
42. In light of the above, and having considered the withheld information, the Commissioner is satisfied that it is exempt information by virtue of section 33(1)(b) and section 33(2).

Balance of public interest

43. Information to which the exemption at section 33 applies may still be released if the balance of the public interest favours this.
44. The complainant argues that disclosing the information is in the public interest because it facilitates:
 - scrutiny of decision making
 - accountability for the spending of public money
 - public debate
 - exposure of any misconduct; and
 - the public being kept informed about possible dangers to health and safety.
45. Monitor agrees that there is a clear public interest in public affairs being conducted transparently and in the public being aware of matters that may be detrimental to their health and safety. Monitor also acknowledges that whether NHS foundation trusts comply with the conditions of their licence, and establish proper and appropriate governance arrangements, is also of legitimate public interest.
46. However, Monitor has also submitted arguments for withholding the requested information. It has been established that communications about the APR process between Monitor and NHS foundations trusts are not published because Monitor relies on the full and frank provision of information in order to carry out its regulatory functions effectively.

47. Monitor therefore says that there is a strong public interest in it being able to operate an efficient, effective and expeditious APR procedure, and having a 'safe space' in which to consider expert analysis. Any disclosure that would cause Monitor to have to reconsider requesting sensitive information that it needs to perform its statutory functions would be detrimental to the regulation process.
48. Monitor also argues that there is strong public interest in it maintaining the trust and confidence of the NHS foundation trusts it regulates. Trusts that are open and willing to share detailed confidential information with Monitor mean that it does not have to rely on its statutory powers to compel trusts to provide information to it. Disclosing the information in question would damage relationships with this particular Trust, and with the sector more generally.
49. Finally, Monitor has told the Commissioner that there is a considerable amount of information in the public domain about the performance of NHS foundation trusts, and South London and Maudsley NHS Foundation Trust in particular. As mentioned in this notice, the Deloitte report is available for inspection at the Trust's offices. This contains information about the recommendations made in the KPMG review and it is Monitor's view that the KPMG review adds little, if anything, of substance to that which is already in the public domain.
50. The Commissioner tends to agree with Monitor's assessment of the public interest in this case as favouring the withholding of the information. In addition to its arguments above, he notes that Monitor decided to close the investigation in light of the steps the Trust took to address the issues that had been raised in KPMG's review, and that no further regulatory action was necessary. There do not appear to be any current concerns about this particular Trust that might give more weight to the public interest arguments for releasing the information. The Trust is currently rated as 'No evident concerns' on Monitor's website.
51. In light of the above, the Commissioner has concluded that the public interest in maintaining the exemption at section 33 outweighs the public interest in disclosure.
52. Since the Commissioner has decided that the information is exempt from disclosure under section 33, and that the public interest favours withholding it, he has not found it necessary to go on to investigate Monitor's application of section 40 and 41 to this information.

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@hmcts.gsi.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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