

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 November 2015

Public Authority: West London Mental Health NHS Trust (the Trust)

Address: Trust Headquarters
1 Armstrong Way
Southall
UB2 4SD

Decision (including any steps ordered)

1. The complainant has requested the independent investigation into the historic management of finances relating to capital projects undertaken within the capital estates and facilities department. The Trust refused to provide the requested information under section 36(2)(c), section 41 and section 40(2) FOIA.
2. The Commissioner's decision is that the Trust has correctly applied section 36(2)(c) FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 19 May 2015 the complainant requested information of the following description:

"I would like a copy of the recently completed independent investigation into the historic management of finances relating to capital projects undertaken within the capital estates and facilities department. I have been told by the Trust's Director of Communications that the report is complete."
5. On 18 June 2015 the Trust responded. It refused to disclose the requested information under section 40(2) and section 41 FOIA.

6. The complainant requested an internal review on 24 June 2015. The Trust sent the outcome of its internal review on 29 July 2015. It upheld its original position.

Scope of the Case

7. The complainant contacted the Commissioner on 11 August 2015 to complain about the way his request for information had been handled.
8. During the course of the Commissioner's investigation the Trust also applied section 36(2)(c) FOIA. It wrote to the complainant on 20 October 2015 to confirm the late application of section 36(2)(c).
9. The Commissioner has considered whether the Trust correctly applied any of the exemptions it has cited to the withheld information.

Reasons for decision

10. Section 36 FOIA provides that,

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(2)(b) would, or would be likely to, inhibit-

- i. the free and frank provision of advice, or
- ii. the free and frank exchange of views for the purposes of deliberation, or

(2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

11. The Trust has applied section 36(2)(c) FOIA to the withheld information.
12. In determining whether the exemption was correctly engaged by the Trust, the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:

- Establish that an opinion was given;
 - Ascertain who was the qualified person or persons;
 - Ascertain when the opinion was given; and
 - Consider whether the opinion was reasonable.
13. The Trust explained that the qualified person is the Acting Chief Executive, Mr Paul Stefanoski. It explained that the opinion was provided on 19 October 2015. The qualified person's opinion was that section 36(2)(c) FOIA was applicable in this case. It explained that the qualified person had access to all relevant material including the withheld information. A copy of the submissions to the qualified person and the qualified opinion were provided to the Commissioner.
14. The Trust said that the submissions put to the qualified person explained that disclosure would be likely to have an impact on similar future investigations by undermining the Trust's ability to robustly investigate allegations of misconduct. It also said it would be likely to inhibit individuals' willingness to raise concerns openly and without fear of unwarranted media coverage. It said it would be likely to impact on staff more widely through, for example, reducing open and honest communications among staff, senior management, patients and stakeholders. Disclosure would be likely to cause unwarranted damage to the health and reputation of individuals under investigation or assisting the investigation on behalf of the public authority. This could impact the willingness of staff members to be involved in investigations in future.
15. The qualified person's opinion is that disclosure would be likely to prejudice the conduct of public affairs under section 36(2)(c). The qualified person explained that the Trust is a large Trust, with a complex portfolio of services. He said historically the Trust has been challenged in terms of the quality of patient care, staff engagement and morale, governance systems, and business processes. He said that senior management is well sighted on the challenges and how to address them, and it is making good progress on all these fronts. He explained that the Trust has been open and honest about the challenges it faces, and has made efforts to engage with the public and the media to explain the work being done. He explained that a vital element of ensuring progress is ensuring that people have the ability to raise concerns within the organisation, and real progress has been made to strengthen the relationships between staff and management. As a consequence, staff are now able to raise concerns which may previously not have been raised.

16. The qualified person considers that the disclosure of this report would be likely to prejudice the Trust, in that the improvement journey set out above would be at risk. He said disclosure would be likely to damage the relationship between staff and senior management, because staff would be less likely to be forthcoming and open about issues of genuine concern in the Trust. The qualified person is aware that negative press had already made staff more anxious about participating in Trust investigations, and he considers that publication of this report could only worsen the situation, now and in the future.
17. Finally the qualified person acknowledged that this exemption was not applied at the time of the request or at the internal review stage, however he considers that it would have been just as relevant at these earlier stages as it is now.
18. Some of the submissions that have been put to the qualified person are not directly relevant to this exemption, for example arguments relating to the health and reputation of staff, however after having viewed the qualified person's opinion as detailed at paragraphs 15-17 above, it is clear that the opinion is a reasonable one based upon the relevant factors that have been taken into account. The Commissioner therefore considers that section 36(2)(c) was correctly engaged.
19. As the Commissioner has decided that the exemption is engaged, he has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)¹.
20. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the

¹ EA/2006/0011; EA/2006/0013

severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would, or would be likely to inhibit the free and frank provision of advice.

Public interest arguments in favour of disclosing the requested information

21. The Trust appreciates that, as a public body, the Trust has a duty to be open and transparent, especially in respect of investigations such as this which are of particular interest to the public. It said that the Trust has sought to fulfil its obligations to the public in terms of transparency and accountability by engaging with the media in a full and frank manner. The Trust said that it has provided a full response on each occasion and to each question raised by the media.

Public interest arguments in favour of maintaining the exemption

22. The Trust has explained that it believes the following public interest arguments favour maintaining the exemption:

Safe Space

There is a public interest in enabling public authorities to protect a space within which staff can talk openly about issues in relation to the conduct of Trust business.

The Chilling Effect

The Trust argued that the success and integrity of reviews of this nature depend upon those participating in them being willing to engage in an open and robust way. It considers that the public interest is best served when staff and others feel able to speak up and the Trust is able to act on these concerns, engaging others as necessary. This culture of openness gives the Trust the strongest possible ability to investigate when issues arise. It considers that publication of this report, which has not found fault would not serve the public interest in this respect.

The Timing of the Request

The withheld report is dated March 2015 and the request in this case was made in May 2015, very shortly after completion. The input provided by staff was therefore very recent which increases the impact of the chilling affect arguments presented by the Trust.

Balance of the public interest arguments

23. The Commissioner considers there is a strong public interest in openness and transparency, particularly in relation to an investigation into Trust finances. This is because it would provide the public with a greater understanding and reassurance of how the Trust has tackled these issues and whether their actions are appropriate and sufficient to safeguard public spending.
24. The Commissioner does however consider that this kind of review does require a 'safe space' for it to be able to obtain information from staff to enable it to fully investigate where issues have arisen. There is also a requirement for free and frank sharing of views. Disclosure of information which would prevent this 'safe space' for consideration and which would be likely to inhibit the frankness and candour of such provision of information by staff would not be in the public interest. Particularly as at the time the request was made, the investigation had only very recently completed.
25. The Commissioner considers that there is a strong public interest in disclosure of information relating to the review as it could potentially effect a number of individuals in the Trust's locality relying upon its services and more generally in terms of public spending. However the Commissioner considers that there is a strong public interest in allowing the relevant parties safe space to enable views to be shared freely and frankly and information provided to the investigation relating to this matter. As the investigation was only recently completed at the time the request was made, this adds greater weight to the arguments in favour of maintaining the exemptions.
26. On balance the Commissioner considers that in this case, the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exemptions. Section 36(2)(c) FOIA was correctly applied in this case.
27. As the Commissioner considers that section 36(2)(c) FOIA was correctly applied and as this covers all of the withheld information, he has not gone on to consider the application of any of the other exemptions any further.

Right of appeal

28. 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

29. 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.
30. 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

Pamela Clements
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Wycliffe House
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