

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 May 2017

Public Authority: Southern Health NHS Foundation Trust

Address: Trust Headquarters
7 Sterne Road
Tatchbury Mount
Calmore
Southampton
SO40 2RZ

Decision (including any steps ordered)

1. The complainant has requested a copy of a Board Capability Review initiated by Southern Health NHS Foundation Trust ("the Trust"). The Trust refused to provide the information by virtue of the exemptions at section 36(2)(b)(ii), 36(2)(c), 40(2) and 41 of the FOIA.
2. The Commissioner's decision is that the Trust has correctly applied the section 36(2)(b)(ii) exemption and the balance of the public interest favours maintaining this exemption and withholding the requested information. She requires no steps to be taken.

Request and response

3. On 30 June 2016, the complainant wrote to Southern Health NHS Foundation Trust ("the Trust") and requested information in the following terms:

"Please provide a copy of the Board Capability Review referred to in the Press Statement released on 30 June 2016 (redacting where necessary any information which today remains sensitive information or which it is in the public information (tested at the date that you process this request) that the information remain confidential)."

4. The Trust responded on 8 July 2016. It stated that it did not hold a full Board Capability Review as when the statement was made on 30 June it

was to state that the Review had been initiated but at the time of the request was not held by the Trust. The Trust confirmed it did hold the initial conclusions in respect of some board members but not the substantive report for the whole Board. For the information held so far, the Trust considered it was exempt from disclosure on the basis of section 40(2) of the FOIA.

5. The complainant asked for an internal review of this decision on 13 July 2016 but before this was completed he re-made his information request on 25 July 2016 as the Trust then had the full Review in its possession. The Trust advised the complainant that, as it was still reviewing the initial request, it would consider the new request in light of information available at the time and the new information available now.
6. Following the internal review the Trust wrote to the complainant on 19 August 2016. It stated that whilst it did not hold the substantive report at the time it responded to the request it was now in possession of this but considered it exempt on the basis of sections 36(2)(b)(ii) and (c), 40(2) and 41 of the FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 1 September 2016 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of her investigation to be to determine if the Trust has correctly applied the cited exemptions – sections 36(2)(b)(ii), 36(2)(c), 40(2) or 41 – to withhold the requested information.

Reasons for decision

Section 36

9. Section 36(2)(b)(ii) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, its disclosure would, or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.
10. Section 36(2)(c) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, its disclosure would, or would be likely to prejudice the effective conduct of public affairs.
11. In determining whether either of the two limbs of the exemption was correctly engaged, the Commissioner is required to consider the

qualified person's opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:

- Ascertain who the qualified person is,
 - Establish that they gave an opinion,
 - Ascertain when the opinion was given, and
 - Consider whether the opinion was reasonable.
12. The Trust has explained that for the purposes of section 36 its qualified person is its Chief Executive. In this case the opinion was provided by the Trust's interim Chief Executive and the Commissioner is satisfied this was the qualified person at the time the request was made. The Trust has explained that the qualified person was provided with the overarching report and given a description of the individual reports.
 13. The Commissioner notes the qualified person gave his opinion at the time the internal review was conducted as it was not possible to do so earlier as the full report was not held by the Trust at the time the initial refusal notice was sent. With regard to the qualified person not having the full individual reports when providing his opinion; in the circumstances it was felt that it was inappropriate for members of the Board to see each other's individual reports due to the sensitive nature of the reports. Therefore, it was felt that the qualified person could offer an opinion based on a description of the individual reports. The Commissioner accepts that in this case it was reasonable not to provide full access to each individual report and that a description and summary alongside the full board report was sufficient for the qualified person to offer their opinion.
 14. The qualified person may apply the exemption on the basis that the inhibition to the free and frank exchange or the prejudice to the effective conduct of public affairs either 'would' occur or would only be 'likely' to occur. This means that there are two possible limbs upon which the exemption can be engaged.
 15. The term 'likely' to inhibit is interpreted as meaning that the chance of any inhibition or prejudice should be more than a hypothetical possibility; there must be a real and significant risk. The alternative limb of 'would' inhibit is interpreted as meaning that the qualified person considers it is more likely than not that the inhibition or prejudice would occur.
 16. The qualified person has clearly stated that his opinion is that the prejudice 'would' occur. It is on this basis that the Commissioner will consider whether the qualified person's opinion is reasonable.

17. When considering whether the opinion is reasonable the Commissioner is not required to determine whether it is the only reasonable opinion that can be held on the subject. It is quite possible for two people to hold differing views on the same issue, both of which are reasonable. Nor is it necessary for the Commissioner to agree with the qualified person's opinion.
18. The Commissioner notes that the history and context of the reports is important in understanding why the Trust considers disclosure would have the prejudicial effects it has cited. The Trust was under enhanced governance oversight from NHS Improvement following several widely reported issues. A Board Capability Review was initiated and undertaken by a firm of business psychologists and this was split into a review of Board effectiveness and individual assessments of Executives and Non-Executives.
19. During the time the request for information was still being considered, the reports were received from the business psychologists and the Trust advises that the Board Capability Review was never completed – the overarching Report provided to the Board and the discussions of it was not concluded and the Report remains incomplete. The Trust states that to date only one person within the Trust has seen all the individual reports and only limited feedback has been provided to individual Board members.
20. It is for some of these reasons that the Trust considers the stated prejudice would arise and these arguments were put to the qualified person. It was argued that disclosure of the report would undermine the Trust's ability to consider and implement the recommended changes as it would remove the 'safe space' needed for the Trust to implement any changes.
21. Expanding on this point the Trust advised the qualified person that the Trust Board had been under significant pressure due to factors such as widely reported criticisms following a patient's death and Monitor oversight. The Trust was concerned that disclosing the reports into the public domain would impact on its ability to offer an effective public service and to act on any recommendations or concerns raised by causing a diversion of resources to manage the impact of disclosure.
22. In terms of the prejudice to the effective conduct of public affairs the Trust argued that the Trust would not be able to robustly investigate its governance and it relied heavily on the willingness of individuals to participate in feedback and to learn from reflective feedback. Disclosing the reports would undermine this willingness as it would suggest that individuals cannot be confident their input will be confidential, leading to less frank and honest feedback being provided.

23. The Commissioner considers it important to clarify, particularly for the consideration of section 36(2)(b)(ii), that there once the reports were finalised and received there was to be a deliberation process in which the Trust would consider the findings of the report and what action should be taken. It is therefore the view of the qualified person that disclosing the reports at the time of the request would have inhibited the free and frank exchange of views for the purposes of these deliberations.
24. The Commissioner recognises that disclosing the reports would undermine the discussion of sensitive issues as individuals would be less free and frank in their commentaries if they believed their opinions would not be kept confidential. She has considered this in the context of the reports and their designed purpose and she accepts that the contributions to these reports were provided to assist in allowing the Trust to fully review its governance in light of the significant scrutiny it was under and the perceived failings at the Trust. As such the Commissioner is satisfied that section 36(2)(b)(ii) is engaged, that the qualified person's opinion that the disclosure would inhibit the free and frank exchange of views for the purposes of deliberation, is a reasonable one.
25. In light of the above the Commissioner is satisfied that the opinion of the qualified person is a reasonable one and that therefore the exemption provided by section 36(2)(b)(ii) is engaged.
26. Section 36 is subject to the public interest test. This means that the requested information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure. In assessing the public interest in maintaining the exemption the Commissioner will consider the impact on the Trust's ability to debate the findings of the report and on the willingness of individuals to engage in any debate and offer opinions to improve governance.

Public interest arguments in favour of disclosure

27. The Trust acknowledges there is a general public interest in disclosing information which increases accountability and transparency. Disclosing this information would show how decisions are made and how the Trust carries out its functions which in turn would increase trust and allow for greater participation in public debate on the Trust's governance.
28. Specifically in relation to the disclosure of the information requested in this case; the Trust accepts there is a strong public interest in knowing that the Trust is well led at a time when its governance and leadership is under scrutiny. Disclosing the Board Capability Assessment which was

undertaken using public money would also show that this money has been well spent and the Assessment conducted properly and thoroughly.

29. The complainant has argued that disclosure of the information is in the public interest to allow for matter to be debated by the public in full view of the relevant facts. The complainant points to the fact that the interim Chair of the Trust board made a public announcement based on the initial conclusions of the Board Capability Review and therefore argues it has clearly been used to make important decisions and the Trust should be fully transparent.

Public interest arguments in favour of maintaining the exemption

30. The Trust has argued that many of the reasons it considers the exemption to be engaged are also arguments in support of the public interest in withholding the information. In particular that it is in the public interest that the Trust can act effectively and efficiently via its board. It argues that at the time of the request the issues was still 'live' in that decisions were still being deliberated on and that disclosing the reports would have compromised the decision making and working relationships in the Trust. This would not have been in the public interest as the Trust needed to be able to discuss debate and make decisions on how to ensure better governance going forwards.
31. The Trust also argues there is a public interest in respecting the confidences of those that participated in the review process and preserving the willingness and ability of individuals to participate and learn in a reflective capacity to ensure the effective functioning of the board and the wider Trust.
32. Furthermore the Trust is of the view that the public interest in disclosure can and has been met in other ways which do not require the disclosure of the reports. For example, it points to discussions around the outputs of the Board Capability Review which have taken place in Trust board public meetings¹

Balance of the public interest test arguments

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<http://www.southernhealth.nhs.uk/EasysiteWeb/getresource.axd?AssetID=110015&type=full&servicetype=Inline>

33. As explained earlier, the Commissioner does not have to agree with the qualified person's opinion to accept the exemption is engaged. However in this case, by accepting the opinion is reasonable, the Commissioner does recognise there is the potential for the disclosure of the reports to cause individuals to be less willing to participate in discussions and to offer opinions, resulting in the potential impact on the effectiveness of the board review. She also must acknowledge that at the time of the request disclosing the reports could have diverted resources and attention from debating the findings and making decisions on future governance. The question is one of whether this inhibition is likely to be severe and frequent enough to outweigh any public interest in disclosure.
34. The Commissioner recognises that at the time the request was made the reports were yet to be fully discussed and reviewed and were to play an important part in the Trust's review of its governance structure with a view to making improvements and changes. The severity and extent of the inhibition to the free and frank exchange of views that would be caused by disclosure has to be considered in this context. Disclosure would make discussions more difficult as individual board members would be more reluctant to engage, added to this is the fact that if the individual reports were disclosed certain board members analysis would be known by all the other board members making working relationships much more complicated. Disclosure would also impact on the ability of the Trust to move forwards in an efficient and effective manner as it would place additional scrutiny on the Trust at a time when there was already significant external pressure on it.
35. It also cannot be ignored that the Board Capability Review and individual reports were produced by having discussions with staff that were done with an implied confidentiality. It is the view of the Trust, and the Commissioner, that the individuals who were involved in this process did so in a free and frank manner in order to ensure the reports were fit for purpose. To disclose the reports in light of this would undermine the trust between the individual contributors and the Trust.
36. In view of the above, the Commissioner finds that disclosing the reports would have an impact on the ability of the Trust to openly discuss and debate the reports in order to make decisions about governance as individuals would be more reluctant to engage with the process if they felt their contributions would be revealed to the public at a time of extreme scrutiny.
37. There is clearly a public interest in maintaining the exemption provided by section 36(2)(b)(ii) in order to prevent this level of harm. It is now necessary to consider the public interest factors in favour of disclosure.

38. The Commissioner does recognise that there is a genuine public interest in the disclosure of information about the Trust board and the governance of the Trust. The Trust had been subject to several high profile criticisms and was under oversight by the Care Quality Commission (CQC) and Monitor (now NHS Improvement). Clearly the disclosure of these reports would have been in the public interest as it would have provided greater transparency about the issues facing the Trust and may have shed some light on some of the reasons for the perceived failings at the Trust.
39. That being said, the Trust argues this is balanced against the fact that there are channels for disclosure of information about the Trust's governance, such as the fact that CQC inspections are published. In this case, at the time of the request the CQC were investigating the Trust and therefore there was already external scrutiny of its governance underway with the findings to be made public. Again, the Trust also drew attention to the discussions of the Board Capability Review in the Trust public board meeting minutes.
40. Having considered this, the Commissioner accepts this goes some way to meeting the public interest in information on governance at the Trust but this does not extinguish the public interest in disclosure of information which will provide a greater insight into the Trust board and governance and assist in the public understanding the issues at the Trust that have led to the high profile criticisms. As well as this governance of Trust's is of a wider general public interest and greater transparency around how Trusts are governed will carry some weight.
41. In conclusion, the Commissioner finds there is a public interest in disclosing the requested information. However, disclosing the reports will have a significant chilling effect on the willingness of individuals to participate in discussions about the reports to make decisions on future governance and on future discussions and contributions that may be needed. Such a chilling effect would undermine the ability of the Trust to carry out its functions and effectively review its performance. Added to this disclosing the reports at the time of the request would have almost certainly drawn significant attention from the media and the public due to the ongoing scrutiny the Trust was under. This distraction from being able to review the reports without public commentary and discuss openly and frankly the findings would not have been in the public interest. The Commissioner is therefore satisfied that this harm outweighed the value in disclosing the reports at the time of the request and she therefore finds that the public interest favours maintaining the exemption. She does not require the public authority to take any steps.

Right of appeal

42. 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

43. 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.
44. 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

Jill Hulley
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