

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 July 2017

Public Authority: NHS Northumberland Clinical Commissioning Group

Address: County Hall
Morpeth
NE61 2EF

Decision (including any steps ordered)

1. The complainant has requested information on a decision by Northumberland CCG to temporarily close beds at Rothbury Community Hospital and copies of Financial Recovery Plans and Transformation Plans. The CCG withheld information on the decision under sections 36(2)(b)(i) and (ii) of the FOIA and refused to provide the Financial Recovery Plan on the basis of section 43(2) of the FOIA.
2. The Commissioner's decision is that the CCG has correctly applied the provisions of section 36(2)(b) to withhold information on the decision to temporarily close the beds and has also correctly withheld the Financial Recovery Plan by virtue of the exemption at section 43(2) of the FOIA. She requires no steps to be taken.

Request and response

3. On 8 September 2016, the complainant wrote to NHS Northumberland Clinical Commissioning Group ("the CCG") and requested information in the following terms:
 - 1) *"All minutes of meetings and any other written records from 1/4/15, concerning the prior discussions and eventual decision to temporarily close the beds at Rothbury Community Hospital (RCH)*
 - 2) *All emails, either sent or received, within the CCG itself and between the CCG and Northumbria FT, from 1/4/15, concerning*

the prior discussions and eventual decision to temporarily close the 12 beds at RCH.

- 3) *A copy of the CCG's Financial Recovery Plan 2016-17*
 - 4) *A copy of the Northumberland Tyne & Wear Sustainability and Transformation Plan 2016*
 - 5) *Records from work undertaken on the Northumberland Primary & Acute Care system plan, relating to the future and role of community hospitals."*
4. The CCG responded on 6 October 2016. It stated that for parts 1, 2 and 5 of the request it held information but considered this exempt from disclosure under sections 36(2)(b)(i) and (ii). For part 3 the CCG explained information was held but engaged the section 43(2) exemption from disclosure and the public interest favoured withholding the information. For part 4 the CCG applied the section 22 exemption stating that the Sustainability and Transformation Plan would be published in the future.
 5. Following an internal review the CCG wrote to the complainant on 4 November 2016. It stated that it upheld the decision to withhold all minutes of meetings and other written records concerning the discussions and decision to temporarily close beds and to refuse to disclose all emails about this under section 36(2)(b)(i) and (ii) of the FOIA. It upheld the decision to withhold the Financial Recovery Plan under section 43(2) of the FOIA and to refuse to provide the Sustainability and Transformation Plan under section 22. For the information at part 5 of the request, the CCG now cited section 21 as records of work undertaken on Northumberland Primary & Acute Care system plan was now reasonably accessible online.

Scope of the case

6. The complainant contacted the Commissioner on 7 November 2016 to complain about the way his request for information had been handled.
7. During the course of her investigation, the CCG sought to also apply section 36 to the information withheld from part 4 of the request – the Financial Recovery Plan. In addition to this, after some further questioning the CCG accepted it had not made the information requested at part 5 reasonably accessible but that any information it held on discussions about the future and role of community hospitals had already been identified and considered alongside the information requested at parts 1 and 2.

8. The Commissioner therefore considers the scope of her investigation to be to determine if the CCG has correctly applied section 36(2) to withhold the information identified at parts 1 and 2 of the request and if the CCG has correctly applied either section 36(2) or 43(2) to withhold the information identified at part 3 of the request.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

9. The CCG considers that sections 36(2)(b)(i) and (ii) are engaged in relation to the information it holds for parts 1 and 2 of the request. The Commissioner has viewed this information and notes that for part 1 the information is an agenda and meeting note with action plan. For part 2 the information is contained in a number of emails and their attached papers.
10. Section 36(2)(b)(i) 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 provision of advice.
11. 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.
12. 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.
13. The CCG has explained that for the purposes of section 36 its qualified person is its Chief Operating Officer. In this case the opinion was provided by the CCG's Chief Operating Officer and the Commissioner is satisfied this was the qualified person at the time the request was made. The CCG has explained that the qualified person was provided with the withheld information as well as the arguments both for and against disclosure.

14. The qualified person may apply the exemption on the basis that the inhibition to the free and frank exchange provision of advice or exchange of views 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 stated that her opinion is that the prejudice 'would be likely' to 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 CCG has argued that disclosure of both the minutes and the emails in which the future of Rothbury Community Hospital ("RCH") were discussed would be likely to inhibit the ability of public authority staff to express themselves openly, honestly and completely, or to explore extreme options when providing advice or giving their views as part of a deliberative process.
19. The Commissioner notes that the information being withheld primarily was created in August 2016 when the discussions and decision to temporarily close beds at RCH was made. However the Commissioner is aware that this decision was to be temporary and subject to monitoring and review before any longer term decisions were to be made. She considers it important to clarify, particularly for the consideration of section 36(2)(b)(ii), that even though the decision had been made at the time of the request there was to be further deliberation and discussion before the CCG made any longer term plan. It is therefore the view of the qualified person that disclosing the information at the time of the request would have been likely to inhibit not only the free and frank provision of advice in the future but also the free and frank exchange of views for the purposes of further deliberations.
20. The Commissioner recognises that disclosing the information 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 minutes of the meetings and the discussions that took place over email and their designed purpose and she accepts that the contributions to these exchanges were provided to assist in allowing the CCG to fully explore the best options. As such the Commissioner is satisfied that section 36(2)(b)(i) and (ii) are engaged, that the qualified person's opinion that the disclosure would inhibit the free and frank exchange of views for the purposes of deliberation and the free and frank provision of advice, is a reasonable one.

21. In light of the above the Commissioner is satisfied that the opinion of the qualified person is a reasonable one and that therefore the exemptions provided by sections 36(2)(b)(i) and (ii) are engaged.
22. 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 CCG's ability to deliberate on any longer term options and on the willingness of individuals to engage in any debate and offer opinions.

Public interest arguments in favour of disclosure

23. The CCG acknowledges there is a general public interest in disclosing information which increases openness and transparency. Disclosing this information would show how decisions were made at RCH which would in turn increase trust in the CCG's governance.
24. The complainant has argued that disclosure of the information is in the public interest to better understand the reasons for the bed closures at RCH. The complainant argued that if the closures were temporary then there is no legitimate basis for not disclosing the information but disclosing it will allow scrutiny of the decision-making process and show whether the CCG had already determined this would become a permanent closure.

Public interest arguments in favour of maintaining the exemption

25. The CCG 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 CCG can act effectively and efficiently in the best interests of the patient care and safety.
26. At the time of the request the decision to close beds at RCH was a temporary one and the CCG would have needed space to debate its

options going forwards. Disclosing the discussions that had taken place would not have been in the public interest as the CCG needed to be able to debate all available options, no matter how extreme, to determine the best course of action in the future.

27. The CCG is firmly of the view that inhibiting the provision of advice and the free and frank exchange of views would be likely to impair the quality of decision making and this would not be in the public interest.
28. Furthermore the CCG is of the view that it had tried to meet the public interest in the decisions made at RCH by organising a public meeting to discuss the review of in-patient services.

Balance of the public interest test arguments

29. 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 information to cause individuals to be less willing to participate in discussions and to offer opinions, resulting in the potential impact on the effectiveness of decision making. She also must acknowledge that at the time of the request disclosing the information could have diverted resources and attention from debating more permanent solutions. The question is one of whether this inhibition is likely to be severe and frequent enough to outweigh any public interest in disclosure.
30. The Commissioner recognises that at the time the request was made no permanent solution had been decided on. The CCG was in a period of looking at its wider financial situation and exploring options for reducing costs. The severity and extent of the inhibition to the free and frank provision of advice and exchange of views that would be caused by disclosure has to be considered in this context. Disclosure would make discussions more difficult as individuals would be more reluctant to engage. Disclosure would also impact on the ability of the CCG to move forwards in an efficient and effective manner as it would place additional scrutiny on the CCG at a time when it was making important decisions to ensure its financial viability.
31. In view of the above, the Commissioner finds that disclosing the information would have an impact on the ability of the CCG to openly discuss and debate options in order to make decisions about future operations 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 scrutiny.

32. There is clearly a public interest in maintaining the exemption provided by section 36(2)(b)(i) and (ii) in order to prevent this level of harm. It is now necessary to consider the public interest factors in favour of disclosure.
33. The Commissioner does recognise that there is a genuine public interest in the disclosure of information about the CCG and its decision to temporarily close beds at RCH. Clearly disclosing information which would shed some light on the discussions and advice that led to this decision would be, to some extent, in the public interest as it would provide greater transparency about the reasons for the decision and the issues facing the CCG.
34. In conclusion, the Commissioner finds there is a public interest in disclosing the requested information. However, disclosing the information would, at the time of the request, have had a chilling effect on the willingness of individuals to participate in discussions to make decisions on more permanent solutions and on future contributions that may be needed. Such a chilling effect would undermine the ability of the CCG to carry out its functions effectively to review the best and most fiscally responsible decisions. At the time of the request the decision to close beds at RCH was a temporary measure and any distraction from the CCG being able to discuss, debate and determine how to move forwards would not have been in the public interest. The Commissioner is therefore satisfied that this harm outweighed the value in disclosing the information at the time of the request and she therefore finds that the public interest favours maintaining the section 36(2)(b) exemptions in relation to the information held for parts 1, 2 and 5 of the request.
35. The Commissioner has next gone on to consider the application of section 43(2) to withhold the Financial Recovery Plan requested at part 3 of the request.

Section 43(2) – prejudice to commercial interests

36. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.
37. The term 'commercial interests' is not defined in the FOIA; however, the Commissioner has considered his awareness guidance on the application of section 43. This comments that:

*"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."*¹

38. The withheld information is the CCG's Financial Recovery Plan ("FRP"). It contains details of the CCG's contracts with suppliers and its spending. The Commissioner is satisfied the FRP by its very nature is commercial information.
39. Having concluded that the withheld information falls within the scope of the exemption the Commissioner has gone onto consider the prejudice which disclosure would or would be likely to cause and the relevant party or parties which would be affected.

The nature and likelihood of the prejudice occurring

40. The CCG has explained that it had been placed under NHS Legal Directions² on 1 September 2016 and was therefore under these directions when the request for information was made. The directions required the CCG to reconsider the FRP and include it in an Improvement Plan by 7 October 2016. When responding to the request for the FRP the CCG did not therefore have a current and live FRP as this was in the process of being reconsidered and included in the Improvement Plan. The version of the FRP held at the time of the request was the original version the directions required the CCG to reconsider.
41. The CCG further explained that once the Improvement Plan was approved by NHS England, it would then be expected to enter a period of negotiation with other public bodies and suppliers with a view to reducing contract sums and identifying savings. The CCG argues that if the original FRP (some of which formed the basis of the Improvement Plan) had been made public at the time of the request this would have been likely to seriously compromise the ability of the CCG to negotiate a positive outcome.
42. In addition to this, at the time of the request the CCG was in the process of sensitive negotiations with partners to form an Accountable Care

¹ See here:

http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx

² <https://www.england.nhs.uk/commissioning/wp-content/uploads/sites/12/2016/09/ccg-directions-northumberland.pdf>

Organisation (ACO)³ and as such if elements of the FRP had entered the public domain it could have impeded the negotiations.

43. In this case the CCG has argued that disclosure would be likely to prejudice its own commercial interests. It must therefore demonstrate that there is a real and significant risk of prejudice occurring. The CCG's main arguments are that the FRP would have impacted on future negotiations with suppliers and public bodies on reductions in contract sums and savings and that it would impact on its negotiations with partners to form an ACO.
44. Although the CCG has not provided information to make the causal link between the disclosure of the FRP and the impact on these negotiations the Commissioner has considered whether there is a link given the sensitive nature of the contents of the FRP.
45. The Commissioner is of the view that when negotiations are ongoing there is likely to be a greater argument that disclosing information not otherwise publicly known about the financial situation at a public authority would be likely to impact on those negotiations. Given the CCG was in a position where it was required by NHS legal direction to form an Improvement Plan and enter these negotiations it is not unreasonable to conclude that disclosing the FRP before these negotiations took place would give suppliers a knowledge and foresight about the financial situation at the CCG and undermine the CCG's position in these negotiations.
46. The Commissioner considers that section 43(2) FOIA was therefore correctly applied and she has gone on to consider the public interest test in this case.

Public interest arguments in favour of disclosure

47. The CCG recognised the public interest in disclosing information which would promote openness, transparency and show the CCG is attempting to achieve best value for money.

Public interest arguments in favour of maintaining the exemption

³ <https://www.england.nhs.uk/ourwork/new-care-models/vanguards/care-models/primary-acute-sites/northumberland/>

48. The CCG argues that it was required by NHS England to reconsider the FRP and releasing the FRP when it was subject to change would impact on public confidence in the CCG to carry out its statutory functions.
49. The CCG was of the view that releasing the FRP into the public domain would be likely to compromise the negotiations and lead to an inability to secure quality services and value for money. Similarly, it would have been likely to impact on negotiations with partners to form an ACO as financial proposals which would have directly affected the proposals were included within the FRP.

Balance of the public interest arguments

50. The Commissioner does consider that there is a public interest in disclosure of information that would demonstrate that the CCG is managing its finances appropriately and is taking steps to ensure it is financially viable in the future.
51. However the Commissioner must balance this with the fact that the CCG was in a period of negotiation on two fronts when the request was made. Not only that but the FRP it held at the time of the request was being reconsidered and may have been subject to change. Disclosing the FRP at this time may have affected negotiations by not only revealing information to suppliers and service providers to undermine the CCG's negotiating position; but also by providing an incomplete picture of the CCG's position given the directions by NHS England for the FRP to be reconsidered and used to inform an Improvement Plan. The Commissioner does not consider there is a public interest in putting the CCG at a commercial disadvantage and this is particularly strong given the timing of the request and the sensitive negotiations the CCG was engaged in.
52. Therefore, the Commissioner considers that the public interest in ensuring the CCG was not put in a commercial disadvantage outweighs any public interest in disclosure. Section 43(2) was therefore properly engaged.

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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