

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 July 2017

Public Authority: University Hospitals Bristol NHS Foundation Trust

Address: Trust Headquarters
Marlborough Street
Bristol
BS1 3NU

Decision (including any steps ordered)

1. The complainant has requested emails sent and received by University Hospitals Bristol NHS Foundation Trust's ("the Trust") Chief Executive relating to the Eleanor Grey review. The Trust withheld this information on the basis of section 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c).
2. The Commissioner's decision is that the section 36(2)(b) and 36(2)(c) exemptions are engaged but the Trust has failed to demonstrate the public interest favours withholding the information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the emails and attachments held by the Trust
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 30 June 2016, the complainant wrote to the Trust and requested information in the following terms:

"Please provide copies of all emails sent and received by Robert Woolley between (and including) June 21 and today's date (up to the time of this email) and which relate in any way to the Eleanor Grey review. Please include all attachments."

6. The Trust responded on 28 July 2016. It stated that it held information within the scope of the request but considered this exempt from disclosure by virtue of sections 36(2)(b)(i), (b)(ii) and (c) of the FOIA.
7. Following an internal review the Trust wrote to the complainant on 19 January 2017. It stated that it upheld its decision to withhold the information within the scope of the request under the cited exemptions.

Scope of the case

8. The complainant contacted the Commissioner on 25 January 2017 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of her investigation to be to determine if the Trust has correctly applied any of the subsections of section 36(2) to withhold the information it holds and if so, where the balance of the public interest lies.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

10. The Trust considers that sections 36(2)(b)(i), 2(b)(ii) and 2(c) are engaged in relation to the information it holds. The Commissioner has viewed this information and notes that there are a number of emails and attachments which have been identified by the Trust as relevant to the request.
11. 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.
12. 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. Section 36(2)(c), on the other hand, refers to the prejudice that may *otherwise* occur through the release of the requested information. If section 36(2)(c) is used in conjunction with any other exemption in section 36(2), the prejudice envisaged must be different to that covered by the other exemption. In previous cases the Information

Tribunal has found that the exemption may potentially apply to circumstances where disclosure could disrupt a public authority's ability to offer an effective public service.

13. In determining whether any of these limbs of the exemption has been 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.
14. 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 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 withheld information as well as the arguments both for and against disclosure.
15. The qualified person may apply the exemption on the basis that the prejudice to the relevant interests protected by 2(b) & (c) either 'would' occur or 'would be likely' to occur. This means that there are two possible limbs upon which the exemption can be engaged.
16. 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.
17. The qualified person has 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.
18. 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.

Section 36(2)(b)(i) and (ii)

19. The Trust has argued that disclosure of the minutes would lead to a detrimental impact on the Trust's way of working. As a large organisation working over several sites communications of a sensitive and frank nature have to take place over email and disclosing the information in this case would impact on future discussions taking place in this way and on the Trust's deliberative process.
20. The Commissioner notes that the report¹ into children's heart services in Bristol, led by Eleanor Grey QC, was published on 30 June 2016. This was also the date the request was made by the complainant and the information requested covers the period leading up to publication.
21. Although the report had been published on the day the request was made the information that has been withheld discussed the approach the Trust intended to take regarding the publication, any media issues and discussions on various letters intended to be sent to affected parties. The Commissioner considers it important to clarify that although the report had been published when the request was made the emails that have been identified by the Trust contain information on actions not yet taken by the Trust and on how to handle upcoming media issues. Therefore, the view of the qualified person is that disclosure of this information at the time of the request would have inhibited 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 deliberations on how to move forwards.
22. The Commissioner recognises that disclosing the information could 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 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 Trust to fully explore the best course of action in managing the publication of the report in a sensitive and appropriate manner.
23. As such the Commissioner is satisfied that sections 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

1

http://www.uhbristol.nhs.uk/media/2930210/the_report_of_the_independent_review_of_childrens_cardiac_services_in_bristol.pdf

deliberation and the free and frank provision of advice, is a reasonable one.

24. 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.

The public interest test

25. 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 section 36(2)(b) exemption the Commissioner will consider the impact on the Trust's ability to deal with the consequences of the report's publication and on the willingness of individuals to engage in any debate and offer opinions.

Public interest arguments in favour of disclosure

26. The Trust acknowledges there is a general public interest in disclosing information which helps further the public's understanding of the way in which the Trust operates and its accountability.
27. The complainant argues that as the information is contained in communications sent and received by the Chief Executive of the Trust on the subject of the deaths of children there is a compelling public interest in disclosure. The public need to have confidence that the Trust is willing to be open and transparent about serious issues and withholding information implies a willingness to cover up how it has dealt with the review. The complainant further argues that disclosure would show how the Trust responds to critical reviews and whether decisions made on the advice are sufficiently robust.

Public interest arguments in favour of maintaining the exemption

28. 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 seek free and frank advice to make decisions and operate effectively and efficiently.

Balance of the public interest test arguments

29. Having seen the withheld information, the Commissioner must consider where the balance of the public interest lies. In doing so, she has taken into account the opinion of the qualified person that disclosure would

cause the inhibition described, this carries a certain amount of weight through to the public interest test.

30. However, the exact weight that should be given to maintaining the exemption depends on the particular circumstances of the case. This means that whilst the Commissioner accepts that a reasonable opinion has been expressed that inhibition would occur she will go on to consider the severity, extent and frequency of that inhibition to determine where the balance of the public interest lies.
31. The Commissioner notes there is a public interest inherent in section 36(2)(b), that being a prejudice-based exemption, in avoiding harm to the decision making process. She has taken into account that there is automatically some public interest in maintaining this exemption.
32. The main arguments advanced by the Trust relate to the concept of a 'chilling effect'. The chilling effect argument is that disclosure of information would inhibit free and frank discussions in the future and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making.
33. The Commissioner's guidance on section 36² states that:
"Chilling effect arguments operate at various levels. If the issue in question is still live, arguments about a chilling effect on those ongoing discussions are likely to be most convincing. Arguments about the effect on closely related live issues may also be relevant. However, once the decision in question is finalised, chilling effect arguments become more and more speculative as time passes. It will be more difficult to make reasonable arguments about a generalised chilling effect on all future discussions."
34. In this case the report, which was the subject of all of the communications, was published on the day the request was made. In addition to this, the Trust also published a copy of the letter sent to parents which was the subject of some of the discussions in the emails the Trust has withheld. The Trust also published a media response with its views on the findings of the report and the Commissioner notes that, again, the media response was the subject of some of the discussions in the withheld emails. The Commissioner does not therefore accept there

² https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

is a valid chilling effect argument in relation to this specific information. However, she accepts the qualified person's opinion that disclosure could lead to a more cautious expression of views in the future.

35. However, when considering the public interest, the Commissioner should give such 'chilling effect' arguments appropriate weight according to the circumstances of the case and the information in question.
36. Having viewed the withheld information, the Commissioner notes that although some of the information isn't entirely anodyne, she couldn't identify significant content that is so candid it would hinder the free and frank provision of advice or exchange of views so severely or so frequently or extensively that it would outweigh the public interest in disclosure.
37. The Commissioner acknowledges that there is information on this issue in the public domain (namely, the media response and letter to parents), and that this goes some way to meeting the public interest in the matter. However, she considers that the requested information is more detailed than the publicly available information and shows how the Trust was prepared to react to the publication of the review. This information would provide the public with an insight into the thinking of the Trust and the consideration it was giving to the findings of the report.
38. The Commissioner has considered the public interest arguments presented in this case and has given due weight to the opinion of the qualified person and has considered the likely extent, frequency and severity of any impact of disclosure on the free and frank provision of advice and exchange of views for the purposes of deliberation in the context of preparing for the release of a report.
39. The Commissioner has concluded that in the circumstances of this case the public interest in maintaining the exemption does not outweigh the public interest in disclosure of the requested information and therefore the exemption at section 36(2)(b) has been incorrectly applied.

Section 36(2)(c)

40. The record of the qualified person's opinion stated that disclosure of the information would:

"lead to confusion and/or misinterpretation. Responding to further communications/questions arising from such disclosure would demand an unreasonable effort and would divert crucial resources from important public functions."

41. The Commissioner considers that the qualified person has failed to provide sufficient explanation as to *how* disclosure of the actual withheld information in this case would have led to confusion or misinterpretation. The information is discussions and advice on how to manage the publication of the report and how to interact with various stakeholders about this. It is not clear how this information, should it be disclosed, would be confusing or lead to misinterpretation. Nor is it clear how disclosing this information would divert resources from other public functions. The qualified person has not provided any detail to explain why it is believed that this information would result in such a significant amount of additional questions that it would place an unreasonable demand on the Trust.
42. That being said, the Commissioner has to reach a view on whether this opinion is reasonable. To determine this it is only necessary to conclude that the opinion is not irrational or absurd and she has taken the view in previous cases that an opinion that disclosing information that might create a burden on a public authority can be a reasonable opinion.
43. Whilst the Commissioner does not consider the qualified person has providing much detail and explanation as to why he considers disclosure in this case would prejudice the effective conduct of public affairs, it is not unreasonable to believe that disclosing the information would result in increased questions and enquiries to the Trust; therefore diverting resources from other areas to respond. It follows therefore that the Commissioner must accept the opinion is a reasonable one and that section 36(2)(c) is engaged.

The public interest test

44. 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 section 36(2)(c) exemption the Commissioner will consider the impact on the Trust in terms of dealing with any increased enquiries or scrutiny as a result of the disclosure.

Public interest arguments in favour of disclosure

45. The public interest arguments in favour of disclosure are the same as those set out for the section 36(2)(b) exemption.

Public interest arguments in favour of maintaining the exemption

46. 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 was in a position to manage the increased attention from the publication of the Eleanor Grey review report.

Balance of the public interest test arguments

47. Having seen the withheld information, the Commissioner must consider where the balance of the public interest lies. In doing so, she has taken into account the opinion of the qualified person that disclosure would cause the prejudice described, this carries a certain amount of weight through to the public interest test.
48. However, as with the section 36(2)(b) exemption the exact weight that should be given to maintaining the exemption depends on the particular circumstances of the case. This means that whilst the Commissioner accepts that a reasonable opinion has been expressed that prejudice would occur she will go on to consider the severity, extent and frequency of that inhibition to determine where the balance of the public interest lies.
49. The Commissioner notes there is a public interest inherent in section 36(2)(c), that being a prejudice-based exemption, in avoiding harm to the workings of the public authority. She has taken into account that there is automatically some public interest in maintaining this exemption.
50. The Commissioner's guidance on section 36³ states that:

"this category of exemption is intended to apply to those cases where it would be necessary in the interests of good government to withhold information ... and where the disclosure would prejudice the public authority's ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of the disclosure."
51. In this case the report, which was the subject of all of the communications, was published on the day the request was made. As already discussed a letter sent to the parents was also disclosed at this time as well as a media response. The Commissioner notes that the publication of all of this material would have resulted in the Trust being subject to increased queries and correspondence. The question is

³ https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

whether disclosing the information which details the internal discussions of the Trust on how to handle the release of the report would have generated any additional burden on the Trust and if so, whether this would have been severe and extensive enough to outweigh the public interest in disclosure.

52. The Commissioner did not receive any further arguments from the Trust to explain this and therefore she has based her decision on the content of the withheld information and the situation at the time the request was made. As has already been noted, the Commissioner acknowledges the information which has been withheld is not entirely trivial but she has not been able to identify content which is so candid or revealing that it would have a chilling effect on the future communications and the provision of advice. For much the same reasons, it is difficult to see how disclosing this information would have generated so much additional work for the Trust that it would have been unreasonably burdensome and distracting to prevent the Trust being able to carry out normal activities.
53. The Commissioner does accept that disclosing the information may have resulted in some additional correspondence to the Trust, as is always likely to be the case when disclosure of this type are made, but she does not feel the Trust has adequately demonstrated that the severity and frequency of this is sufficient to outweigh the genuine public interest in disclosure.
54. In addition to this, the information was requested at a point when the Trust would already have anticipated increased scrutiny and correspondence so would have planned and resourced to be prepared for this. Therefore, should the information have been disclosed at the time of the request it is arguable that the Trust would have been adequately resourced to deal with any additional enquiries from the disclosure.
55. Balanced against this is a strong public interest in disclosure to provide the public with an open and transparency record of how the Trust approached the publication of the review into a significant issue which had attracted media interest and was of great importance to affected families. This information would provide the public with an insight into the thinking of the Trust and the consideration it was giving to the findings of the report.
56. The Commissioner has considered the public interest arguments presented in this case and has given due weight to the opinion of the qualified person and has considered the likely extent, frequency and severity of any impact of disclosure on the Trust.

57. The Commissioner has concluded that in the circumstances of this case the public interest in maintaining the exemption does not outweigh the public interest in disclosure of the requested information and therefore the exemption at section 36(2)(c) has been incorrectly applied.

Right of appeal

58. 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

59. 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.
60. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF