

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 March 2018

Public Authority: Northern Health & Social Care Trust

Address: Causeway House
Route Complex
Ballymoney
BT53 6BP

Decision (including any steps ordered)

1. The complainant has requested information from the Northern Health & Social Care Trust ("the Trust") in relation to a Serious Adverse Incident (SAI) investigation which was carried out by the Trust. The Trust disclosed information in response to part of the complainant's request, however it stated that it did not hold some of the requested information, applied section 12(1) of the FOIA to part of the request, and applied section 42(1) of the FOIA to the remainder.
2. The Commissioner's decision is that the Trust has correctly applied the above sections of the FOIA to the complainant's request. Therefore the Commissioner orders no steps to be taken.

Request and response

3. On 21 October 2016, the complainant wrote to the Trust and requested information in the following terms:

"This is a request for all records held by the Trust in relation to this investigation of the Serious Adverse Incident Level 2 that was carried out by the Northern Trust from the 28th October 2015 until present, could you please supply the following information:

1. To include all minutes of any meetings held in relation to this investigation with the exception of the meeting on the 29th October and 18th December 2015 that were held with my family.
2. To include all handwritten notes of any meetings held with members of the Trust in relation to this SAI Level 2 Investigation.
3. To include all records of Questions and Responses that were asked of Home Care Independent Living (HCIL)'s Management by the Trust either by telephone, email or letter in relation to this SAI Level 2 Investigation.
4. To include all handwritten notes of [name redacted] staff/Care Workers who were interviewed in January 2016. We were previously advised that these were provided by the Trust but in fact they were incomplete.
5. To include copies of the Draft Reports, numbers 3 - 4 - 5 - 6 - 7 - 8 - 9 - 11 - 12 - 13 - 14 - 15 and 16, that were conducted within the above time-period.
6. To include all Email records, sent or received in relation to this SAI Level 2 Investigation.
7. To include all Telephone records made in relation to this SAI Level 2 Investigation.
8. To include any unseen records by the family that was gathered by the Trust in relation to this SAI Investigation.
9. To include any legal advice received in relation to the SAI, in particular advice around interviewing HCIL staff.
10. Details of any new procedures instigated or commenced by the Trust on the back of recommendations and learning in our SAI process.

4. The Trust responded on 20 January 2017. Following a telephone conversation with the complainant, in which she agreed to narrow the scope of part 6 of her request, it provided some information in relation to that part of the request. It stated that it did not hold any information within the scope of parts 1, 2, 7 and 8 of her request and advised her that it had already told her to contact the company directly for the handwritten notes requested in respect of part 4 of the request. In relation to part 3 of her request, the Trust applied section 12(1) and in relation to part 5 it provided her with some draft documents which accompanied e-mails disclosed to her in response to part 6 of her request. The Trust applied section 42 of the FOIA to part 9 of her request and disclosed information in response to part 10.
5. Following an internal review the Trust wrote to the complainant on 10 March 2017. It stated that the reviewer was upholding the original decision.

Scope of the case

6. The complainant contacted the Commissioner on 13 March 2017 to complain about the way her request for information had been handled.
7. The Commissioner has considered the Trust's handling of the complainant's request, in particular the above exemptions and sections of the FOIA.

Reasons for decision

Information not held

Section 1- General right of access to information held by public authorities

8. Section 1(1) of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information relevant to the request and if so, to have that information communicated to them. This is subject to any exclusions or exemptions that may apply.

9. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner follows the lead of a number of First-tier Tribunal decisions in applying the civil standard of the balance of probabilities. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds information which falls within the scope of the request.

The complainant's position

10. The complainant informed the Commissioner that the response sent to her in respect of parts 1, 2, 7 and 8 of her request was incomplete and that the Trust should have documented its meetings and also should hold handwritten notes and telephone contact and other records.

The Trust's position

11. The Commissioner wrote to the Trust on 2 August 2017 and put a number of questions to it to establish whether it held any further information within the scope of parts 1, 2 7 and 8 of the complainant's request.
12. The Trust replied to the Commissioner on 3 October 2017 and stated that it had not held any formal or minuted meetings regarding the investigation apart from those held on 29 October and 18 December 2015. Therefore the Trust's Investigating Officer, panel members and Governance staff do not hold any further information within the scope of parts 1 and 2 of the complainant's request.
13. In relation to part 7, the Trust does not record staff's telephone conversations and does not hold itemised billing for telephone records, so this information is not held by the Trust.
14. In Question 8, the complainant requested 'unseen records' which the Trust asserted was not a valid request under the FOIA, as it did not specify details or a location to assist in finding the information. The Commissioner does not necessarily agree that this was not a valid request, as it was essentially a request for any documents created or produced as part of the

SAI investigation which has not previously been seen by the complainant, of which the Trust should have a record. However, the Information Governance Team sought clarification to this effect from the complainant and this was amended to handwritten notes from [name redacted]. That individual advised the Trust that she did not have any handwritten notes so the Trust responded by stating it did not hold this information.

15. The Trust advised the Commissioner that it holds no similar information to that requested. The Trust furnished the complainant with all information it holds within the scope of her FOI request and considers that it has given appropriate advice and assistance to the complainant.

Conclusion

16. The Commissioner has considered the Trust's submissions on this matter. This has included consideration of the searches for recorded information that the Trust has undertaken, and the stated absence of any known business reasons for which the specific information indicated by the complainant should be held.
17. The Commissioner has therefore concluded, on the balance of probabilities, that no further relevant recorded information is held by the Trust.

Section 12(1) of the FOIA – cost limit

18. Section 12(1) allows a public authority to refuse to comply with a request for information if the authority estimates that the cost of compliance would exceed the 'appropriate limit', as defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations.")
19. This limit is set in the Fees Regulations at £600 for central government departments and £450 for all other public authorities. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 18 hours for the Trust.
20. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) states that an authority can only take into account the costs it reasonably expects to incur in:

- determining whether it holds the information;
- locating a document containing the information;
- retrieving a document containing the information; and
- extracting the information from a document containing it.

21. The four activities are sequential, covering the retrieval process of the information by the public authority.

The Trust's position

22. The Trust informed the Commissioner that its Information Governance Team considered it appropriate to apply Section 12 of the FOIA by aggregating all the questions. The Commissioner agrees with this approach as she considers that the complainant's correspondence contains 10 separate requests, however they fulfil the conditions for aggregation as set out in regulation 5 of the Fees Regulations. Before considering the exemption, the Information Governance Team contacted the complainant to explain that section 12 was being considered and asked for the questions to be re-clarified. It was also explained to her that if the request was not clarified, then the exemption would be applied and some questions may not be replied to.

23. In response, the complainant amended Question 6 and Question 8 to specific information relating to named individuals but she did not provide clarification for the remaining questions.

24. The Governance Department advised it did not hold the information requested at Question 1 (this was known from previous requests) so the search was completed for Questions 2- 9.

25. After the clarification the Governance Department identified approximately 370 pages of correspondence which took 16 hours to search and retrieve and print the emails requested. The Governance Department then asked the Information Governance Team for advice as there was further work required to cross-reference to existing printed documents to avoid duplication and identify any third party issues.

26. On the basis of this correspondence, the Trust asked the Governance Risk Manager to stop searching for information when the 18 hours of staff time had been reached (this was via email and manual file searches but did not take into account any travel time between Trust sites connected to this retrieval). After a comprehensive search within the 18 hours, no correspondence or information was located in response to Question 3, only some draft reports were identified for Question 5 and all the emails were found in response to Question 6.

27. In respect of the SAI reports (Question 6) the Governance Department

updated drafts of the SAI report, so some versions were not saved.

Many of these drafts were sent by email between the Governance Department and the named individuals, so they were identified during the email search for the other questions.

28. The Commissioner has considered the Trust's submissions regarding its application of section 12(1) of the FOIA. She is satisfied that the Trust has demonstrated that its estimate that the cost of compliance with the request, and staff time taken to locate, retrieve and extract the relevant information is a cogent and reasonable one. She is further satisfied that the Trust has fulfilled its obligation to advise and assist requestors as set out in section 16 of the FOIA by asking the complainant to refine and clarify part of her original request.

Section 42 of FOIA – Legal professional privilege

29. Section 42 of the FOIA states that a public authority may refuse to disclose information if it is subject to legal professional privilege.
30. This exemption is not absolute, so it is subject to the public interest test. Therefore, in addition to demonstrating that the withheld information is subject to legal professional privilege, a public authority must consider the arguments for and against disclosure and demonstrate, in a given case, that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption.
31. Legal professional privilege covers communications between lawyers and clients for the purpose of obtaining legal advice and communication and/or documents created by or for lawyers for the dominant purpose of litigation.
32. The Commissioner's guidance on section 42 of the FOIA states:-

"Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the dominant (main) purpose of seeking or giving legal advice. The legal adviser must have given advice in a legal context; for instance, it could be about legal rights, liabilities, obligations or remedies. Advice from a lawyer about financial matters or on an operational or strategic issue is unlikely to be privileged, unless it also covers legal concerns, such as advice on legal remedies to a problem."

The Trust's position

33. The legal advice was requested after a family member requested the Trust interview HCIL staff directly. The purpose of this advice was to inform a Trust decision and the release of this information would likely impact on the Trust's relationship with the family and HCIL. The information sought was for the Trust's legal position in this aspect of the SAI investigation and there is no public interest in releasing the information, as it was specific to this particular issue and its circumstances. Whilst the Trust has been transparent with the family in all aspects of the investigation, the Trust must be able to seek confidential advice from its legal advisors on sensitive SAI investigations and ensure the quality of this confidentiality.
34. Having reviewed the withheld information the Commissioner notes that the emails in the chain consist of emails from a member of staff within the Trust to the Trust's Chief Legal Adviser asking for advice. This email sent to the lawyer also includes the earliest email in the chain which is the subject on which advice was requested. The subsequent email from the lawyer back to the Trust offers the requested legal advice. It is clear that this information constitutes communications and is information exchanged between the internal client and lawyer for the dominant purpose of seeking and providing legal advice.
35. Therefore, the Commissioner accepts that Section 42(1) applies as the information related to communications between the Trust and its legal counsel, for the purpose of seeking legal advice and direction. As section 42 is a qualified exemption, the Commissioner has considered the public interest factors for and against disclosure of the information withheld under that exemption.

Public interest factors in favour of disclosure

36. The Trust accepts that there may be a public interest in knowing that any legal advice given to the Trust has been followed and all issues properly considered.
37. There is also a public interest in the public being able to scrutinise the actions of Trust staff and how they make decisions.
38. The Trust should be accountable for the public money being spent on seeking legal advice and should be transparent in its use of resources and assuring the public that decisions taken by it are lawful.

Public interest factors in favour of maintaining the exemption

39. The Trust argues that disclosure of the legal advice would prohibit the Trust's ability to seek legal advice on complex issues, if there was a fear that such legal advice may be disclosed into the public domain.
40. The Trust also argues that its staff must be able to seek legal advice without fear or loss of confidentiality.
41. The Trust further argues that fear of disclosure of legal advice would limit the Trust's ability to have free and frank exchange of information with legal professionals, which may not result in the best possible advice being given.

Balance of the public interest arguments

42. The Commissioner recognises that there is a weighty public interest in preserving the principle that a client can consult with their legal adviser in a full and frank manner. This is necessary so that they can lay out all the issues relevant to the matter they require advice on and so that the lawyer can respond in full to those enquiries. This may include explaining any weaknesses in, or criticism of their client's position. Without being able to have such frank exchanges it would not be possible for clients to obtain the best legal advice possible and so defend their legal rights, or ensure they are acting in compliance with the law.
43. The Commissioner also recognises the public interest in openness and transparency and she understands the value in providing access to information to enable the public to understand more fully why decisions are made and to encourage public debate and scrutiny.
44. In this case, the withheld information relates to internal discussions regarding Trust policy and its legal position regarding certain aspects of an investigation. Disclosure of that information would assist the public in understanding more closely how the specific decision in this case was made, but would not assist in any wider public understanding of how the Trust makes decisions in general, as the information is specific to this particular case.
45. In this case, having perused the withheld information and considered all the arguments, the Commissioner considers there are stronger public interest arguments in maintaining the exemption. The legal advice was still relevant at the time of the request, it discusses the Trust's position on a particular issue and advises it regarding this. The Trust disclosing the legal advice on this would not be in the public interest as it would undermine the principle of legal advice and hinder the Trust being able to obtain full and thorough legal advice in order to make balanced decisions. To outweigh this clear public interest in

maintaining the exemption there would need to be a compelling argument for disclosure and in this case the Commissioner has not been presented with any such argument and does not consider that there is a reasonable justification for disclosure.

46. If disclosure were ordered in this case, it would undermine the principle of legal professional privilege and the ability in future for the Trust to obtain necessarily free, frank and candid legal advice, which in turn would hinder the Trust's ability to carry out its functions and make fully informed decisions. The Commissioner does not consider such consequences are in the interests of the wider public.
47. Therefore, the Commissioner has concluded that section 42(1) of the FOIA has been correctly applied by the Trust in respect of the legal advice.

Right of appeal

48. 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)
Tribunals, GRC & GRP
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

- 49. 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.
- 50. 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

Deirdre Collins
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