

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 June 2019

Public Authority: **Barnet, Enfield and Haringey
Mental Health NHS Trust**

Address: **Trust Headquarters
Orchard House
St Ann's Hospital
St Ann's Road
London N15 3TH**

Decision (including any steps ordered)

1. Through a multi-part request, the complainant has requested copies of communications between Barnet, Enfield and Haringey Mental Health NHS Trust ('the Trust') and the Information Commissioner's Office ('ICO'). The Trust released some information and has withheld some information under section 21(1) (information already accessible to applicant), section 40(2)(third person personal data) and section 42(1) (legal professional privilege). Finally, the Trust says it does not hold some of the requested information.
2. The Commissioner's decision is as follows:
 - The Trust has correctly applied section 21(1) of the FOIA to some of the information it has withheld.
 - The Trust has correctly applied section 40(2) to some information as it is the personal data of third persons, and therefore exempt.
 - The Trust has correctly applied section 42(1) to some information. This information attracts legal professional privilege and the public interest favours maintaining the exemption.

3. The Commissioner does not require the Trust to take any remedial steps.

Background

4. In its submission to the Commissioner the Trust has provided a background to the request. It notes that the complainant submitted the current request to the Trust under the FOIA in July 2018. This request was made further to a series of requests the complainant made in 2014 relating to the investigation of an incident in which the complainant was involved whilst visiting one of the Trust's premises, and about which he had complained. The request related to various documents pertaining to the incident and the subsequent investigation carried out by the Trust about the complainant's complaint relating to that incident.
5. In its response to a 2014 request the Trust provided some information but information had been redacted under sections 40(2) and 36(2)(b)(ii) (effective conduct of public affairs) of the FOIA.
6. The complainant then contacted the ICO to complain about the Trust's response and was told by the ICO to ask the Trust to carry out an internal review. The complainant remained dissatisfied following the review, which led to a subsequent investigation by the ICO and a decision notice, in which the complaint was not upheld.
7. The complainant appealed to the First-tier Tribunal (Information Rights) and then requested permission to appeal to the Upper Tribunal, which was refused. The Trust says that it understands that the complainant also made a separate request under FOIA to the ICO directly, which led to a decision in the Upper Tribunal.

Request and response

8. On 25 July 2018, the complainant wrote to the Trust and requested information in the following terms:

[2014]

"1[0]. Information amounting to the text of **correspondence between the ICO and MHT** [or vice versa; and including legal or other representatives of either] leading on 19 and then on 27 August 2014 to the signing by MHT's self-described 'acting chief executive' Mary Sexton of 2 ICO Qualified Person Opinion forms; and [1.1] correspondence submitting same to the ICO; and [1.2] any ICO

response to MHT (to include any such communication following MHT's response of 27 August 2014 to my FOI Request); and [1.3] any information thereafter submitted in either direction on that matter of fact.

*2[0]. Information evidencing any internal **MHT deliberations or any discussion** leading up to contact made by MHT with the ICO concerning the production or submission of those QPO Forms of 19 or 27 August 2014, or of the opinions stated therein; and information evidencing any internal MHT deliberations or any submission seeking [2.1] (a) a statutory finding under section 50 that either of such opinions was reasonable; or [2.2] (b) the pleading by the ICO on 09.07.15 or thereafter by MHT that such opinions of Mary Sexton were reasonable.*

[2015]

*3[0]. Information amounting to the text of **correspondence between the ICO and MHT** [or vice versa; and including legal or other representatives of either] leading on 31 July 2015 to the signing by the MHT chief executive Maria Kane of 2 ICO Qualified Person Opinion forms whose receipt was first pleaded on behalf of the ICO on 29.09.15 in information tribunal case [Redacted]; and [3.1] correspondence submitting such forms to the ICO; and [3.2] any ICO response to MHT; and [3.3] any information thereafter submitted in either direction on that matter of fact.*

*4[0]. **Information evidencing any internal MHT deliberations or any discussion** leading up to contact made by MHT with the ICO [or vice versa] (believed to have begun on 24.07.15) and/or to any ICO assessment of said 31 July 2015 opinion forms or the opinions stated therein; and information evidencing any internal MHT deliberations or any submission seeking [4.1] (a) a statutory finding under section 50 that either of such opinions was reasonable; or [4.2](b) the pleading by the ICO on 29.09.15 or by MHT thereafter that such opinions of the MHT chief executive were reasonable.*

Please provide the requested information by hard copy."

9. The Trust responded on 21 August 2018. It released some information. It relied on section 21 with regard to other information that it said it had previously provided to the complainant. The Trust withheld some information under section 40(2) and section 42(1) and said that, with regard to the latter, the public interest favoured maintaining this exemption.

10. Following an internal review the Trust wrote to the complainant on 27 September. It acknowledged that its response could have been clearer and went on to address each part of the complainant's request separately. It said it did not hold information falling within the scope of parts 1.0, 1.1, 1.2 and 3.3.
11. The Trust released further information with regard to part 1.3, with some information withheld under section 40(2). It also confirmed that it was withholding some information relating to parts 1.3, 3.0, 3.1 and 3.2 under section 40(2). Finally, the Trust confirmed that it was withholding information relating to parts 2.0, 2.1, 2.2, 4.0, 4.1 and 4.2 under section 42(1).

Scope of the case

12. The complainant first contacted the Commissioner on 29 August 2018 to complain about the way his request for information had been handled. He confirmed on 1 October 2018 that he remained dissatisfied following receipt of the Trust's internal review.
13. In correspondence to the Commissioner dated 25 March 2019 the complainant indicated that he was dissatisfied with the Trust's application of section 21 and section 40(2).
14. The Commissioner's focus has therefore been on the Trust's application of section 21(1) and 40(2). For completeness she has also considered the Trust's reliance on section 42(1).

Reasons for decision

Section 21 – information accessible to applicant by other means

15. Under section 1(1) of the FOIA, anyone who requests information from a public authority is entitled (a) to be told if the authority holds the information and (b) to have the information communicated to him or her if it is held and is not exempt information.
16. Section 21(1) says that information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
17. Section 21 provides an absolute exemption. This means that if the requested information is held by the public authority, and it is reasonably accessible to the applicant by other means, it is not subject to the public interest test.

18. The Trust has confirmed that it is withholding four 'qualified opinion' forms that fall within the scope of the complainant's request under section 21(1). The Trust has advised that it had previously released these four forms to the complainant. It has noted that in an email to the Trust dated 22 August 2018 the complainant confirmed the following; that the forms "*are already in my possession via First-tier Tribunal case [Redacted] since January 2016*".
19. The Commissioner agrees with the Trust's position. Given the background to the request and the complainant's email above, she is satisfied that this particular information – the four qualified opinion forms – are already reasonably accessible to the complainant and they are therefore exempt information under section 21(1) of the FOIA.

Section 40 – personal data

20. Section 40(2) of the FOIA says that information is exempt from disclosure if it is the personal data of third persons, ie someone other than the applicant, and a condition under either section 40(3A), 40(3B) or 40(4A) is also satisfied.
21. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA').

Is the information personal data?

22. Section 3(2) of the DPA defines personal data as: 'any information relating to an identified or identifiable living individual'.
23. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
24. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
25. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
26. The Trust has confirmed that the information it has withheld under section 40(2) forms part of correspondence associated with parts 1 and 3 of the request and comprises the names and direct contact telephone numbers of employees of the ICO.

27. The Commissioner is satisfied that this information is those individuals' personal data for the reasons given at paragraphs 23 and 24.
28. The fact that information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether any of the conditions under sections 40(3A), 40(3B) or 40(4A) have been met.

Is a condition under section 40(3A) satisfied?

29. The condition under section 40(3A)(a) of the FOIA is that disclosure would contravene any of the data protection principles. The Trust considers that disclosure would contravene principle (a) under Article 5(1) of the General Data Protection Regulation (GDPR).
30. Article 5(1)(a) of the GDPR states that: "*Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject*".
31. In the case of a FOIA request, personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
32. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
33. The Trust has confirmed that the lawful basis most applicable is GDPR basis 6(1)(a) – consent, and basis 6(1)(f) – legitimate interests.
34. Article 6(1)(a) states that processing shall be lawful only if the data subject has given consent to the processing of his or her personal data.
35. In its submission the Trust has confirmed that it does not have the consent of the third party individuals concerned.
36. With regard to the matter of consent, in her published guidance on section 40 the Commissioner notes that for this basis for disclosure to be satisfied the individual must give their consent freely to the specific disclosure, with the understanding that their personal data will be disclosed to the requester under FOIA and therefore potentially to the world at large.
37. She goes on to advise that given the practical difficulties of meeting this condition, it is unlikely to be used in most circumstances and that when a request is made under FOIA, legitimate interests is likely to be the most relevant.

38. The Commissioner has not considered this matter further and finds that the Trust did not have the data subjects' consent to disclose the requested information and that therefore disclosure would not be lawful under article 6(1)(a).

39. Article 6(1)(f) states that processing shall be lawful only if:

"...processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child".

40. In considering the application of Article 6(1)(f) in the context of a request for information under the FOIA it is necessary to consider the following three-part test:

(i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information

(ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question

(iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject (that is, the five staff members in this case).

41. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Is a legitimate interest being pursued?

42. In considering any legitimate interest(s) in disclosing the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

43. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

44. The information in question has been summarised above. It is not quite clear from his correspondence to the Commissioner but the complainant has appeared to argue that that the Trust cannot rely on section 40(2) as the names in question are in the public domain. He has not directed the Commissioner to where these names are published. Nor has the

complainant made the Commissioner aware of any reason why he wants the names and contact details of the ICO employees, specifically, released. Such a reason might support the argument that the complainant has a legitimate interest in this specific information being released. As the Trust has noted, the complainant requested the "correspondence" and, where it is not exempt information, the correspondence has been released.

45. Given the background to the request however, the Trust has acknowledged that the complainant may have an interest in being able to determine how his FOIA request has been managed, how the ICO made decisions about his request, and potentially the seniority of the employees involved. The Trust considers that this is a legitimate interest.
46. The Commissioner has not been aware of any wider societal interest in disclosing the ICO staff members' names and telephone numbers, in this case.

Is disclosure necessary to meet the legitimate interests?

47. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
48. In the Trust's view, the complainant's legitimate interest can be satisfied through its disclosure of the job titles of those involved, and not their names or direct telephone numbers.
49. The Trust has said it has considered the complainant's request and, in its view, it is the existence and the content of correspondence between the Trust and the ICO and the information within the correspondence itself that the complainant appears to be seeking. It does not appear to be the individual names of the ICO employees who corresponded with the Trust. The Trust argues that disclosing the personal data of the ICO employees is not necessary in the circumstances, given that job titles have been disclosed. It considers that non-disclosure of the personal data does not prejudice the complainant's rights to receive information that he has requested through his FOIA request, or to understand how particular decisions were made. With regard to the Trust's obligations of accountability and transparency; the Trust says that disclosing its own employees' names would satisfy such principles and that those names have been provided.

50. The Trust has confirmed that as it does not consider that there is any legitimate interest in disclosing the third party personal data, it has not considered the tests of necessity and balance.
51. The Commissioner agrees with the Trust that the complainant's legitimate interests have been met through the information disclosed to him through this request and through associated requests. She considers that through this information – which includes the job titles of ICO staff involved in his FOI complaint case – the complainant will be able to understand how particular decisions were made and the level of seniority of those making the decisions. The Commissioner does not consider that disclosing the names of ICO staff and their phone numbers in response to his FOI request is necessary to further the complainant's interest in how the decisions were made, associated with an FOI complaint he submitted to the ICO in the past. And if, as the complainant has suggested, this personal data has already been published, any legitimate interest the complainant may have in this information can be met by accessing the information where it is published. Finally, at least one of the members of staff involved no longer works for the ICO.
52. Because the Commissioner has found that part (ii) – the necessity test – has not been met, she is satisfied that processing the personal data in this case would not be lawful under article 6(1)(f). It has therefore not been necessary to consider part (iii) of the test – the balancing test.
53. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms in this case. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
54. Given the above conclusion that disclosure would be unlawful, and would contravene one of the data protection principles, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
55. The Commissioner has therefore decided that the Trust was entitled to withhold the information under section 40(2) of the FOIA by way of section 40(3A)(a). This being the case it has not been necessary to consider the remaining conditions under section 40(3A), 40(3B) or 40(4A).

Section 42 – legal professional privilege

56. Section 42(1) of the FOIA says that information that attracts legal professional privilege (LPP) is exempt from disclosure. This exemption is subject to the public interest test.
57. The purpose of LPP is to protect an individual's ability to speak freely and frankly with their legal advisor in order to obtain appropriate legal advice. It recognises that individuals need to lay all the facts before their adviser so that the weaknesses and strengths of their position can be properly assessed. Therefore legal professional privilege evolved to make sure communications between a lawyer and his or her client remain confidential.
58. The Trust has provided the Commissioner with copies of the information it is withholding under this exemption. It comprises email correspondence between the Trust and its legal team and between the ICO and the Trust and its legal team about matters discussed in the background to this case.
59. In its submission to the Commissioner the Trust has confirmed that it has withheld information that falls within the scope of parts 2 and 4 the complainant's request under section 42(1) on the basis that such information is subject to legal professional privilege. The Trust says that, more specifically, the information is subject to legal advice privilege, as it:
 - is contained in communications between the Trust and its external legal advisors (Bevan Brittan LLP)
 - was made for the dominant purpose of seeking or giving legal advice; and
 - was communicated to and from the Trust's legal advisors in their professional capacity.
 - The legal advice requested was specifically in relation to the Trust's application of the section 36 exemption in response to the complainant's 2014 requests. They relate particularly to:
 - advice around the need to sign the qualified person opinion forms in 2014, the drafting of those forms, the application of section 36 and who should sign the forms in 2014 in the absence of the Trust's Chief Executive
 - advice around the signing of the qualified persons opinion forms in 2015 and the drafting of those forms; and

- advice around the Trust's scheme of delegation and the reasonableness of a particular individual signing the 2014 forms in the absence of the Chief Executive.
60. The Trust says that, in addition, it has also withheld internal communications at the Trust which reiterate or forward the legal advice provided by the Trust's legal advisors. The Trust has withheld this information on the basis that it is "an exchange which refers to legal advice", further to the definition of legal professional privilege provided by the Information Tribunal in *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)*.
61. The Trust has confirmed to the Commissioner that the advice privilege had not been waived because the Trust had not shared the information externally with any other organisation, apart from the ICO.
62. The Commissioner has considered all the circumstances and is satisfied that the information to which the ICO has applied section 42(1) attracts legal advice privilege and is exempt information. Despite the information being exempt from disclosure under section 42(1), it might still be disclosed if the public interest in disclosing the information is greater than the public interest in maintaining the exemption. The Commissioner has therefore gone on to consider the public interest arguments with respect to this information.

Public interest test

Public interest in disclosing the information

63. In its submission the Trust acknowledges that it is in the public interest to demonstrate that its decisions have been made on the basis of high quality legal advice and that it recognises the importance of public confidence in the legality of its decisions. It is, the Trust says, a matter of public interest that it is accountable for its decisions and actions. It could also be seen that there is a public interest in some cases in knowing whether or not legal advice has been followed.
64. The complainant has not presented any public interest arguments to support a position that there is a wider public interest in the information in question being disclosed.

Public interest in maintaining the exemption

65. The Trust argues that it is important that it is able to seek and obtain full and frank legal advice in a confidential setting, and subsequently share that advice internally where necessary, conducive to a candid exchange of views and assessment of potential risks. It says this principle is fundamental to the administration of justice and it is well

established that the Trust should be able to take advice without the fear that it would be disclosed. It would therefore not be in the public interest for the Trust's ability to seek and obtain legal advice in the future to be prejudiced.

66. Without the ability to obtain comprehensive legal advice, the Trust says its decision making would be much reduced for the following reasons:
- The Trust would not be fully informed when making decisions and this would be contrary to the public interest.
 - There is a risk that should legal advice be disclosed in response to FOIA requests, legal advisors and the recipient organisations are likely to avoid making a permanent record of the advice given or only make a partial record of the advice in the future.
 - Disclosure of information provided by legal advisors in their professional capacity would breach the confidential status of privileged communications with legal advisors.
67. Additionally, the Trust says that the legal advice in question, although dating back to 2014 and 2015, concerns a 'live' issue for the Trust and that advice is therefore still applicable and relevant to the Trust.
68. To summarise, the Trust considers that when weighing the public interest in maintaining the exemption against the public interest in disclosing the information, the balance falls in favour of the former.

Balance of the public interest

69. The FTT appeal case about which the requested information was generated was ongoing in 2015, up to three years before the date on which the complainant submitted his request. It might be possible to argue, therefore, that, given the passage of time, the matter – ie the appeal – was no longer a 'live' issue. This in turn might lessen the weight of the public interest argument for maintaining the exemption.
70. Except that, as the Trust has noted, the matter remained 'live' at the time of the complainant's request to it. This is because, as discussed in the background to the request, the complainant submitted a further request to the ICO associated with the same matter, and again appealed the Commissioner's decision in that case to the FTT and, ultimately, to the Upper Tribunal. The Upper Tribunal decision considered whether the FTT's decision had involved the making of an error on a point of law; the Upper Tribunal found that the FTT's decision had not involved such an error. The Upper Tribunal's decision was released in January 2019 ie it was still a 'live' matter at time of the request. Finally, as a result of the

current complaint to the Commissioner, the possibility of further litigation in the future is also real.

71. The Commissioner considers that any public interest there may be in the subject that is the focus of the complainant's request is substantially weaker than the very strong public interest in lawyers and clients being able to talk frankly and openly with each other. There is a strong public interest in maintaining the important principle behind legal professional privilege. It safeguards openness in all communications between client and lawyer and ensures access to full and frank legal advice. This in turn is fundamental to the administration of justice. A client's ability to speak freely and frankly with his or her legal adviser to obtain appropriate legal advice is a fundamental requirement of the English legal system
72. For these reasons the Commissioner is satisfied that the balance of the public interest falls in favour of maintaining the section 42(1) exemption in this case.

Right of appeal

73. 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@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

74. 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.
75. 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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