

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 June 2023

Public Authority: Cardiff and Vale University Health Board
Address: University Hospital of Wales
Heath Park
Cardiff
CF14 4XW

Decision (including any steps ordered)

1. The complainant requested information from Cardiff and Vale University Health Board ("the Health Board") relating to two reviews, one produced by the Royal College of Surgeons (RCS) and one by a firm of solicitors appointed by the Health Board. The Health Board provided some information within scope of the request, denied holding some of the requested information and withheld other information within the scope of the request under section 40 of FOIA (personal information) and section 42 of FOIA (legal professional privilege).
2. The Commissioner's decision is that:
 - On the balance of probabilities, the Health Board does not hold any further information within the scope of parts 2a-2d of the request or parts 5b - 5d of the request beyond that which it has already disclosed.
 - The Health Board is not entitled to rely on section 40 to withhold the information requested in part 2e of the request.
 - The Health Board is entitled to rely on section 42 to withhold the information requested in part 5a of the request.
3. The Commissioner requires the Health Board to take the following steps to ensure compliance with the legislation.

- Disclose the information requested in part 2e of the request.
4. The Health Board 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. The complainant wrote to the Health Board on 26 May 2022 and 27 May 2022 and made a multi-part request for information. The parts of the request relevant to this case are included in the table below.
6. The Health Board responded on 25 November 2022. It subsequently provided an internal review on 10 January 2022 in which it changed its position regarding part 2d of the request. The Health Board's position regarding each part of the request at the time of the internal review is summarised in the following table.

Part of request	Wording of request	Health Board response
2a	"In 2017-2018 an RCS review was conducted, Why was the case A18 omitted from the review?"	Information not held
2b	"When was the decision taken."	Information not held
2c	"Who took that decision"	Information not held
2d	"Is there another version of the RCS review than one shared with me containing 18 cases?"	Original response: Information provided, "The UHB does not hold another version." The Health Board then amended its position at internal review, "In response to request 2(d), that the Health Board does hold a second version of the Royal College of Surgeons Report on 18 Clinical

		Records Relating to Paediatric Surgery dated 4th October 2017. The Health Board can confirm that the second version of the report was shared at Tribunal and with [the complainant] (via [their] legal team) on the 6th October 2022."
2e	"Can the organisation confirm who all was the review shared with in the current format?"	Information withheld under personal information exemption under section 40 of FOIA
5	There was an external legal review of Child Health Governance in 2018 in response to my whistleblowing. Could I request the following;	"We have checked and we do not hold a record of a legal review performed in 2018. We hold a record of a legal review which was presented to Board Development in August 2020 and for the purpose of the 4 questions below, we will answer in that context. If you are requesting information relating to another review performed in 2018, please could you provide further information to help assist us with locating this information?"
5a	a) The recommendations of that review	Information withheld under section 42 of FOIA (legal professional privilege)
5b	b) If those recommendations were accepted when those were implemented	Information not held.

5c	c) The copy of the minutes of that review; it could not have been deleted	Information withheld under section 42 of FOIA (legal professional privilege)
5d	d) When was the review discussed in the Exec Board Meeting and minutes related to that.	Date provided, but no minutes were held, "On the 27th August 2020 the review was discussed in a private board development meeting but no minutes were held. It may be helpful to note that a new Quality Safety and Patient Experience Framework has been launched across the Health Board in 2020/2021"

Scope of the case

7. During the course of the Commissioner's investigation the Health Board changed its position regarding part 2e of the request. It had previously withheld the information about who the RCS review was shared with under section 40 of FOIA. It revised its position, stating it now considered the job titles of those that the RCS review was shared with could be disclosed, but it continued to withhold the names of those individuals under section 40 of FOIA. As of the date of this notice the Commissioner understands the Health Board is yet to disclose the job titles. He has therefore considered the job titles as well as the names in his analysis below.
8. The Health Board also changed its position regarding the information requested in part 5c of the request, it previously withheld this information under section 42 of FOIA. However, the Health Board stated in its submissions to the Commissioner that this was an error and that the Health Board does not hold this information.
9. The complainant confirmed to the Commissioner during the course of his investigation that they are satisfied that the review described by the Health Board as having been presented to Board Development in August

2020 is the review about which they were seeking information in part 5 of their request.

10. The scope of this case will be to consider whether the Health Board handled parts 2 and 5 of the request in accordance with FOIA. Specifically it will consider:
 - Whether the Health Board holds any further information within the scope of parts 2a-2d of the request and/or parts 5b and 5d of the request. Given the Health Board's change in position regarding the information requested in part 5c of the request it will also consider whether the Health Board holds any information within the scope of this part of the request.
 - Whether the Health Board was entitled to withhold the information within the scope of part 2e of the request under section 40 of FOIA.
 - Whether the Health Board was entitled to withhold the information held within the scope of part 5a of the request under section 42 of FOIA.

Reasons for decision

Section 1(1) – Duty to provide information held

11. Section 1(1) of FOIA states that:

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

12. The Health Board's position is that it has now disclosed all of the information it holds within parts 2a-2d of the request and parts 5b and 5d of the request. The complainant disputes this. The Health Board has also changed its position as to whether the information requested in part 5c of the request is held, its position is now that this information is not held.

13. 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 must decide whether on the balance of probabilities a public authority holds any further information which falls within the scope of the request (or was held at the time of the request).
14. This reasoning covers whether, on the balance of probabilities, the Health Board holds further information within the scope of parts 2a-2d of the request and/or parts 5b-5d of the request.
15. During the course of his investigation the Commissioner asked the Health Board to provide details of the searches it had carried out to identify information within the scope of these parts of the request. He also asked the Health Board to address specific points raised by the complainant regarding their reasons for believing that further information was held within the scope of these parts of the request.
16. Regarding parts 2a to 2c of the request, ie why case A18 was omitted from the RCS review, when the decision was taken and who took that decision, the Health Board stated in its submissions to the Commissioner, "The UHB does not hold information on why case A18 was omitted from the review. 19 cases were submitted to the RCS by the UHB. The RCS review omitted A18 from the report and we hold no information on why that decision was taken. It wasn't the UHB's decision to remove case A18 from the report."
17. The Health Board also provided details of the searches it has carried out to ensure that any information within scope of parts 2a to 2c of the request would be identified. It stated, "the former Medical Director and the Assistant Director of Patient Experience were asked to undertake a search for information held in emails and minutes of any meetings in relation to this omission. It was necessary to undertake this search as it could have been possible that in a meeting or email, the RCS explained the rationale as to why case A18 was omitted. The UHB doesn't believe it ever held data on why case A18 was omitted and we are confident that it wouldn't be held by the UHB in an alternative location."
18. The complainant has provided explanations to the Commissioner as to why they believe the Health Board would hold information within the scope of parts 2a-2c of the request, however these are based on the premise that the Health Board would have either taken the decision or been involved in making the decision with the RCS.
19. Given the Health Board's explanation why the information is not held, together with its description of the searches it carried out to locate relevant information, the Commissioner is satisfied that, on the balance

of probabilities, the Health Board does not hold any information within the scope of parts 2a-2c of the request.

20. Regarding part 2d of the request, the Health Board said that there are two versions of the report, both of which have been provided to the complainant. They differ because the original version of the report included wording that made the complainant identifiable, whilst in the second version, the wording was changed as the report was not intended to identify the complainant. The complainant has not provided any specific rationale for believing further information is held within the scope of this part of the request. The Commissioner is therefore satisfied that, on the balance of probabilities, the Health Board does not hold further information about the existence of any other versions of the report.
21. Regarding parts 5b-d of the request the complainant's view is that they would expect this kind of information to be held because "the Health Board is referring to a new policy that has been implemented as a result of the review". The complainant believes that no significant external legal review would be discussed without minutes being taken.
22. The Health Board has stated that it has searched its corporate governance records. In relation to part 5b of the request it has stated, "the UHB does not hold information on the acceptance of the recommendations made within the review". In relation to the minutes requested in parts 5c and 5d of the request, it said "On the 27th August 2020 the Review was discussed in a private board development session. No minutes were taken of that meeting, as is established practice for UHB held Board Development Sessions."
23. In its submissions to the Commissioner the Health Board expanded further on the matter of minutes not being taken at board development sessions, and on the searches it carried out. It said,

"Board Development sessions are distinct from formal Board and Committee Meetings. They are not forums to undertake decision making processes nor to undertake Board business which are issues that are reserved for formal Board and Committee Meetings. Formal Board meetings take place on a bi-monthly basis (January, March, May, July, September and November each year) with Board Development sessions scheduled, bi-monthly between these meetings (February, April, June, August, October and December).

Board Development Sessions are utilised to improve and develop Board Member Relationships, encourage new approaches, receive training and also to discuss, amongst other issues; strategy,

emerging trends, themes and statutory updates. There is no statutory or regulatory requirement for the Health Board to minute these sessions and minutes are not taken and Board Development Sessions.

Whilst Minutes are not taken of Board Development Sessions, the Health Board does hold an Electronic Folder within its shared drive that holds historic papers shared at some, but not all Board development sessions dating back to 2018-2019. A manual search of all folders and subfolders has been undertaken within this drive and the following terms searched; 'Minutes', 'minutes', 'Minute' and 'minute'. Following this search no minutes were located within the folder."

24. The question for the Commissioner is not whether information 'should' be held, but whether the requested information 'is' held. Although the Commissioner accepts the complainant's argument that it would be reasonable to expect such information to be held, given the explanation provided by the Health Board, and its description of the searches it carried, the Commissioner is satisfied that, on the balance of probabilities, the Health Board does not hold any information within the scope of parts 5b-5d of the request.
25. The Commissioner's decision is therefore that, on the balance of probabilities, the Health Board does not hold any further information falling within the scope of parts 2a-2d of the request or parts 5b - 5d of the request beyond that which it has already disclosed.

Section 40 – Personal information

26. The following reasoning covers whether the Health Board is entitled to rely on section 40(2) (personal information) of FOIA to refuse to provide the names of the individuals that the RCS review was shared with, and their job titles (as requested in part 2e of the request).
27. As the Health Board is no longer relying on section 40(2) to refuse to provide the job titles of the individuals, the Commissioner's decision is that the exemption is not engaged with respect to the job titles. He has therefore ordered the disclosure of this information at paragraph 3 of this notice.
28. He has therefore gone on to consider whether the Health Board is entitled to rely on section 40(2) of FOIA to withhold the names of the individuals concerned.
29. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure

of that personal data would be in breach of any of the data protection principles.

30. Section 3(2) of the Data Protection Act 2018 defines personal data as:

“any information relating to an identified or identifiable living individual.”

31. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

32. In this case, the withheld information is the names of the individuals that the RCS review was shared with. Therefore, the Commissioner is satisfied that the requested information is personal data relating to the individuals concerned.

33. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on principle (a), which states:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”

34. In the case of an FOIA request, the 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.

35. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.

36. The complainant was identified within the report, and disputes some of the information held within it. They therefore wish to know who received the report so that they can make the recipients aware of their objections to the report's content. The Health Board confirmed that the original version of the report allowed the complainant to be identified. It said that this was therefore changed as that was not the intention. The Commissioner therefore considers that the complainant is pursuing a legitimate interest and that a disclosure of the information is necessary to meet that legitimate interest.

37. The Health Board argues that the complainant would be able to identify the relevant staff members from the disclosure of their job titles alone. The Commissioner does not accept that this is the case. Whilst some of the job titles may relate to a single employee of the Health Board, there are other job titles in the list provided to the Commissioner which would

apply to multiple members of staff at the Health Board. The Commissioner does not therefore accept the Health Board's argument that disclosure of the names of the individuals is not necessary in order for the complainant to identify the recipients of the report that erroneously identified them.

38. As the Commissioner's decision is that disclosure of the names of the individuals who received a copy of the report is necessary to meet the legitimate interest identified, the Commissioner has gone on to consider the balancing test with respect to this information.
39. The Health Board provided the following information to the Commissioner about how it has carried out the balancing test:

"...our initial assessment was that the release of this information into the public domain, would not be within the reasonable expectations (applying the legitimate interest test) of these individuals. We don't believe that there is a public interest in disclosure and that the interest would solely be for the requesters private interest, which doesn't necessarily preclude disclosure, but it was a factor when initially considering this request.

However, the information was sent in a professional capacity to senior members of staff and is limited just to names. We don't believe that any harm would be caused by releasing these names, despite the expectations of the individuals. The legitimate interests could have been met by requesting consent from the 10 individuals but we didn't take this step when considering the request.

On balance, we believe it would be reasonable to provide [the complainant] with the list of job titles for the 10 individuals. This way, [the complainant]'s personal interest is satisfied as [the complainant], in all likelihood would be able to identify the individuals from this information, but the wider public would, in the main, be unable to do so."

40. The Commissioner disagrees with the Health Board's assessment that it would not be within the reasonable expectations of senior staff to have their names disclosed in response to an FOI request such as this. The information that would be disclosed is minimal, comprising of their name, job title and the fact that they received a copy of the report.
41. Noting that the Health Board's position is that no harm would be caused by releasing the names of the individuals, the Commissioner's decision is

therefore that the interests of the those individuals do not outweigh the legitimate interest in the disclosure of their personal data.

42. The Commissioner has determined that there is sufficient legitimate interest to outweigh the fundamental rights and freedoms of the individuals who received a copy of the RCS report. Therefore, he considers that there is a legal basis for the Health Board to disclose the names of the people who received a copy of the report and its disclosure would therefore be lawful.
43. The Commissioner's decision is therefore that the Health Board is not entitled to rely on section 40(2) of FOIA to withhold either the job titles or the names of the people who received a copy of the report. He has therefore ordered disclosure of this information at paragraph 3 of this notice.

Section 42 - Legal professional privilege

44. The following reasoning covers whether the Health Board is entitled to rely on section 42(1) of FOIA to refuse to provide the information requested in part 5a of the request.
45. Section 42(1) of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings. Legal professional privilege protects the confidentiality of communications between a lawyer and client.
46. In this case, the complainant has requested a copy of an external legal review of Child Health Governance, The review was undertaken by a firm of solicitors appointed by the Health Board. The Health Board's position is that the Review was undertaken for the purpose of obtaining legal advice. The Commissioner is satisfied from the wording of the request that the relevant information would constitute confidential communications between the client and lawyer, made for the main purpose of seeking or giving legal advice. The information is therefore subject to legal advice privilege, and the Commissioner is aware of no evidence suggesting that this privilege has been waived. The exemption provided by section 42(1) of the FOIA is, therefore, engaged in relation to this information. The Commissioner will now go on to consider the public interest test.
47. In balancing the opposing public interest factors under section 42(1), the Commissioner considers that it is necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of legal professional privilege. The general public interest inherent in this exemption will always be strong due to the

importance of the principle behind legal professional privilege: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice. A weakening of the confidence that parties have that legal advice will remain confidential undermines the ability of parties to seek advice and conduct litigation appropriately and thus erodes the rule of law and the individual rights it guarantees.

48. It is well established that where section 42(1) of FOIA is engaged, the public interest in maintaining the exemption carries strong, in-built weight, such that very strong countervailing factors are required for disclosure to be appropriate. The Commissioner notes the decision in the *Cabinet Office v Information Commissioner and Gavin Aitchison* (GIA 4281 2012) where, at paragraph 58, Upper Tribunal Judge Williams said:

“...it is also, in my view, difficult to imagine anything other than the rarest case where legal professional privilege should be waived in favour of public disclosure without the consent of the two parties to it”.

49. Whilst the Commissioner has taken into account the public interest in creating greater transparency over the report, and over the circumstances generally, he considers that, in this case, the balance of public interest lies in protecting the Health Board's ability to obtain full and frank legal advice on a confidential basis. The Commissioner is not aware of any public interest arguments that are strong enough to outweigh or override the inbuilt public interest in the information remaining protected by legal professional privilege.
50. The Commissioner has therefore decided that the public interest in maintaining the exemption at section 42(1) outweighs the public interest in disclosure. Therefore, the Health Board has correctly applied section 42(1).

Right of appeal

51. 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

52. 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.
53. 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

Victoria James
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF