



Freedom of Information Act 2000 (Section 50)

Decision Notice

Dated 10 July 2006

Name of Public Authority: Eastern Health & Social Services Board
Address of Public Authority: Champion House
12-22 Linenhall Street
Belfast BT2 8BS

Summary Decision and Action Required

The Commissioner's decision in this matter is that the Eastern Health & Social Services Board (the "EHSSB") has dealt with the complainants' request in accordance with the requirements of Part I of the Act.

1. Freedom of Information Act 2000 (the "Act") – Applications for a Decision and the Duty of the Commissioner

- 1.1 The Information Commissioner (the "Commissioner") has received an application for a decision whether, in any specified respect, the complainants' request for information made to the EHSSB has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000 (the "Act").
- 1.2 Where a complainant has made an application for a decision, unless:
- a complainant has failed to exhaust a local complaints procedure, or
 - the application is frivolous or vexatious, or
 - the application has been subject to undue delay, or
 - the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision.

- 1.3 The Commissioner shall either notify the complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority.

2. The Complaint

- 2.1 On 24 January 2005 the following information was requested from the EHSSB in accordance with section 1 of the Act.

“All records held by Eastern Health & Social Services Board (either on its own behalf or on behalf of the Office of the Independent Lay Convenor or on behalf of the Independent Lay Chairpersons) relating to my complaints against North and West Belfast Health & Social Services Trust, Down Lisburn Health & Social Services Trust and Ulster Community & Hospitals Trust in respect of their involvement with my late mother [...] from March 2001 until her death on 7th December 2001.

Specifically and in particular (but not exclusively) I wish to inspect all records maintained in respect of my two requests for review in 2001 and again in 2004.”

- 2.2 In a letter dated 21 February 2005, the EHSSB exempted some of the information requested from disclosure under section 30 (Investigations and Proceedings Conducted by Public Authorities) and section 36 (Prejudice to Effective Conduct of Public Affairs) of the Act.
- 2.3 Under the terms of the Data Protection Act 1998 (the “DPA”), the EHSSB offered to release some of the information requested, namely the correspondence between the EHSSB and the complainants. This offer was made in the letter of 21 February 2005 and was clarified in a letter dated 4 March 2005. At this point, the offer to inspect material under the DPA had been widened to also include not only correspondence to/from the complainants, but any other information of which the complainants were the data subjects.
- 2.4 The complainants asked the EHSSB to internally review the decision to withhold some of the requested information on 24 February 2005.
- 2.5 The EHSSB carried out the internal review and reported its findings to the complainants on 4 March 2005. The result of the review was that the section 30 and 36 exemptions were maintained, with a further explanation of the decision being provided. Included with the internal review was a list of the information held by the EHSSB which was covered by the request.
- 2.6 Consequently, the complainants applied to the Information Commissioner on 6 March 2005 for a decision as to whether the EHSSB’s decision to withhold the information was in accordance with the requirements of Part I of the Act.

3. Relevant Statutory Obligations under the Act

Section 1(1) provides 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.”

This right is subject to Section 2 of the Act which provides for exemptions to the rights created by Section 1.

4. Review of the case

Background

4.1 Before making this request for information, the complainants made two separate complaints to the Northern Ireland Ombudsman (the “Ombudsman”) relating to the medical treatment of an individual. The Commissioner is aware that the information requested by the complainant under the Act relates to two complaints against:

- a) North and West Belfast Health and Social Services Trust (the “first complaint”). The request for independent review was rejected by the Independent Lay Convenor, a decision which was subsequently appealed through the Ombudsman’s Office. The Ombudsman rejected this request.
- b) North and West Belfast Health and Social Services Trust; Down Lisburn Health and Social Services Trust; and Ulster Community and Hospitals Trust (the “second complaint”). The request for independent review was also rejected by the Convenor, a decision which was subsequently appealed through the Ombudsman’s Office. At the time the request for information was made, the Ombudsman’s investigation was still ongoing.

It has been determined that these two complaints are identical except for the fact that the second complaint involves two other public authorities.

- 4.2 The complainants asked the Commissioner to investigate the EHSSB’s decision to withhold the requested information. The information request had been refused on the grounds that the information relates to an ongoing investigation being conducted by the Ombudsman (the second complaint), as well as an earlier related investigation (the first complaint). Further, the EHSSB contended that disclosure of the requested information would prejudice the effective conduct of public affairs. In view of this, the EHSSB applied section 30 and 36 exemptions respectively to the requested information.
- 4.3 The Commissioner requested a copy of the exempt information as well as a further explanation of the reasoning behind the application of the exemptions. An issue arose as to whether the exemption applied under section 30(2) was the most appropriate exemption for the nature

of the information applied. In particular, the Commissioner raised the issue of section 30(2)(b) which is centred around the obtaining of information from confidential sources. This provision is designed to protect the identities of confidential sources, such as whistle blowers and witnesses and, from the evidence available, it did not appear that this subsection was applicable to the requested information. After discussion with the Commissioner, the EHSSB withdrew the section 30 exemption in respect of all but two documents and replaced it with an exemption based on section 31 of the Act.

- 4.4 In respect of the two documents to which the section 30 exemption was maintained, the Commissioner understands that this information has now been released to the complainant. This follows the recent completion of the Ombudsman's investigation into the second complaint. In view of this, there are no specified steps which could be made in this Decision Notice relating to section 30 and the Commissioner therefore will not be considering this part of the complaint any further.
- 4.6 In reaching his decision in relation to the application of the exemptions under section 31 and 36, the Commissioner has looked closely at the arguments put forward by both the EHSSB and the complainants, as well as considering legal advice and all other relevant information.

5. The Commissioner's Decision

Section 31 exemption (law enforcement)

5.1 Section 31(1)(g) provides:

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

Section 31(2)(b), (d) and (j) provides:

(2) The purposes referred to in subsection (1)(g) to (j) are –

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

(d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,

(j) *the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.*

- 5.2 The EHSSB submitted that disclosure of the requested information would prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection (2). The EHSSB explained that the investigation into the second complaint made to the Northern Ireland Ombudsman (the "Ombudsman") by the complainant would be prejudiced by disclosure of some of the requested information.
- 5.3 One of the key functions of the Ombudsman is to investigate complaints and the EHSSB contend that disclosure of the requested information would prejudice the Ombudsman's ongoing investigation into the complainant's second complaint. The first and second complaints centred on the alleged improper actions of a health worker; the alleged professional incompetence of that individual; and that the care package put in place by the North and West Belfast Health and Social Services Trust to look after an individual was inadequate. In view of this, the EHSSB believe that the disclosure of some of the requested information would prejudice the Ombudsman's functions for the purposes specified in section 31(2)(b), (d) and (j) respectively.
- 5.4 It has also been submitted that disclosure of the requested information may also prejudice any further investigation into the matter by the EHSSB, which could take place if the Ombudsman exercises his right to refer matters back to public authorities for further consideration. Such a disclosure would therefore affect the effectiveness of the current complaints process and the ability of the Ombudsman and the EHSSB to effectively resolve ongoing complaints.

Whether disclosure would create a likelihood of prejudice

- 5.5 In reaching a decision on this matter, the Commissioner has taken into account the submissions of both parties in assessing whether disclosure of the requested information would create a likelihood of prejudice under section 31(1)(g). It is reasonable to accept the EHSSB's argument that the purposes specified under section 31(2)(b), (d) and (j) are relevant given the nature of the first and second complaints made by the complainant. Therefore, the issue of whether these purposes would be likely to be prejudiced by release of the refused information has been considered.
- 5.6 The Commissioner has first focussed on whether disclosure of the requested information would have been likely to prejudice the Ombudsman's then ongoing investigation of the second complaint. This assessment must be considered at the time the original request for information was made. In making this assessment, an investigation into the way the Ombudsman investigates complaints and the

information that the EHSSB supplied to the Ombudsman was carried out.

- 5.7 The Ombudsman is not automatically supplied with all documentation related to a case by a public authority when it begins an investigation. Instead, the Ombudsman analyses the complaint and assesses what documents are required. Typical documents which the Ombudsman will request are background correspondence and copies of relevant procedures and policies. In this case, the EHSSB explained that some of the information withheld under section 31 has been supplied to the Ombudsman in a summarised format, while the Ombudsman has been furnished with a full copy of all the documents which were requested. These include the Trust papers and any deliberation or communication by the Board in relation to this matter.
- 5.8 Having considered all of the relevant factors of the case, the Commissioner is satisfied that release of the requested information would be likely to prejudice the Ombudsman's investigation into the second complaint, which was ongoing at the time the request for information was made.
- 5.9 Given the Ombudsman's experience in resolving complaints, the Commissioner must presume that he knows what information is required in order to determine a complaint. It has not been put to the Commissioner that this is not the case, nor is there any indication that any important information has been missed and the Commissioner has taken this into account during the investigation.
- 5.10 Like many public authorities with review functions such as investigating complaints, the Ombudsman currently has space in which to investigate complaints without being subject to outside influences. Allowing a general right of access to information related to a complaint which is the subject of an ongoing investigation by the Ombudsman would be likely to inhibit his ability to operate without being subject to outside pressures. The Commissioner considers that the independent and impartial complaint handling process would be likely to be harmed if the Ombudsman were subject to external influences such as political and media pressure while investigating complaints.
- 5.11 In view of this, the Commissioner has concluded that disclosure of the requested information which was refused under section 31 would be likely to prejudice the exercise of the Ombudsman's functions for the purposes specified in section 31(2)(b), (d) and (j). Having said that, the Commissioner recognises that this prejudice will lessen over time, especially given that the Ombudsman's investigation into the second complaint is now complete.

Public interest test

- 5.12 Upon deciding that disclosure of the requested information would be likely to prejudice the Ombudsman's functions, the Commissioner has not gone on to consider whether it would also be likely to prejudice the EHSSB's functions to investigate complaints. In view of this, the Commissioner has instead focussed on the application of the public interest test.
- 5.13 The Commissioner acknowledges that there is a public interest test in the decisions of the Ombudsman being transparent and accountable. This would place an obligation on the office to provide reasoned explanations for decisions. This, in turn, should improve the quality of decisions and administration.
- 5.14 Further, disclosure of the requested information may allow individuals to understand how decisions made by the Ombudsman affect their lives and, in some cases, assist individuals in challenging those decisions. The disclosure of the requested information may also further the understanding of and participation in public health issues and the role of the EHSSB in dealing with complaints and treating patients.
- 5.15 While the Commissioner recognises these public interest factors in disclosure of the information, it is clear that there is an inherent public interest in the current complaint process working effectively. This would provide access to justice for individuals who have a legitimate complaint against a health authority. It seems clear therefore that the public interest is best served by continuing to allow the Ombudsman to investigate complaints thoroughly and impartially without pressure or interference from outside influences.
- 5.16 In addition to this, the Commissioner considers that the Ombudsman has considerable experience in resolving complaints. It can therefore be presumed that he knows what information is required in order to determine a complaint. As a result, the Commissioner does not believe that there is a strong public interest in creating a right of access to information which may be related to the complaint. This could be to try and influence the outcome of an ongoing complaint, thus intruding on the current space which the Ombudsman has in which to remain impartial.
- 5.17 In view of this, the Commissioner believes that the public interest in withholding the information outweighed the public interest in disclosure because of the ongoing Ombudsman's investigation into the second complaint. In coming to this conclusion, the Commissioner is aware that once an investigation has been concluded the public interest in protecting the Ombudsman's ability to reach decisions without being subject to outside influences is likely to diminish. Release of the requested information once investigations are complete would then

serve the public interest considerations outlined above in favour of disclosure.

Section 36 exemption (prejudice to effective conduct of public affairs)

5.18 Section 36 provides:

- (1) *This section applies to –*
 - (a) *information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and*
 - (b) *information which is held by any other public authority.*
- (2) *Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –*
 - (a) *would, or would be likely to, prejudice –*
 - (i) *the maintenance of the convention of the collective responsibility of Ministers of the Crown, or*
 - (ii) *the work of the Executive Committee of the Northern Ireland Assembly, or*
 - (iii) *the work of the executive committee of the National Assembly for Wales,*
 - (b) *would, or would be likely to, inhibit –*
 - (i) *the free and frank provision of advice, or*
 - (ii) *the free and frank exchange of views for the purposes of deliberation, or*
 - (c) *would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.*

5.19 To withhold information under this section of the Act, the exemption needs to be applied by the “qualified person”. The EHSSB is a Health and Social Services Board established under Article 16 of the Health and Personal Social Services (Northern Ireland) Order 1972. For such organisations, the qualified person is the Chief Executive of the EHSSB who is Dr P Kilbane. The EHSSB has provided documentary evidence that the decision to apply the section 36 exemption was taken by Dr Kilbane and therefore, the requirement that the exemption is applied by the qualified person has been satisfied.

5.20 The EHSSB has divided the documents it considers to be exempt from disclosure under section 36 into three separate sections:

- a) The first section contains information where the process of the handling of the first and second complaint is discussed. The information is contained within a range of documents types.
- b) The second section of information considered to be exempt under section 36 relates to correspondence between various

internal parties at the EHSSB. This relates to consideration of the second complaint (which was, at the time the information was requested, subject to an ongoing investigation by the Ombudsman).

- c) The third section of documents relates to internal information which was gathered during the first complaint.

5.21 For the information contained within the first section of withheld information under section 36, the qualified person has taken the decision that the information is exempt on the basis of section 36(2)(b)(i) and (ii). The EHSSB has submitted that the information constitutes a discussion of the way in which the complaint could be resolved and has argued that disclosure of the information would inhibit the free and frank provision of advice and the free and frank exchange of views for the purpose of deliberation. Further, the ability to provide and obtain advice and exchange views is necessary to resolve difficult complaints issues and disclosing such information is likely to inhibit such discussions or the recording of them in the future.

5.22 Turning to the second section of information withheld under section 36(2)(b)(i) and (ii), the qualified person contends that the collection of records should be viewed as a whole. The collection represents the free and frank exchange of views for the purposes of deliberation and / or the free and frank provision of advice. The EHSSB has submitted that the disclosure of information contained in this section may prejudice the ability of officials to freely and frankly provide advice and/or exchange views for the purposes of deliberation particularly while the investigation into the second complaint was ongoing.

5.23 Finally, the third section of information was deemed to be exempt under section 36(2)(b)(i) and (ii). While some information is considered to be exempt because it represents the free and frank provision of advice, most of the information is considered to represent the free and frank exchange of views for the purposes of deliberation. As the second complaint is virtually identical to the first complaint, the qualified person believes that its release would prejudice the ability of officials to provide / obtain advice and to openly discuss complaints. This is felt to be particularly relevant as the Ombudsman's investigation was ongoing when the original request was made.

5.24 The Commissioner has considered these arguments and considers that the opinions of the qualified person are reasonable. In view of this, he has gone on to consider the public interest test.

Public interest test

5.25 The Commissioner acknowledges that there is a clear public interest in the decisions of public authorities being transparent and accountable, by providing reasoned explanations for decisions, including their

deliberations. This, in turn, should improve the quality of decisions and administration and allow individuals to understand how decisions which may affect their lives were made.

- 5.26 In relation to this case, release of the requested information may assist individuals to understand (and possibly challenge) decisions taken under the complaints procedure, thereby potentially improving the effectiveness of the current complaints process. The Commissioner recognises that there is a strong public interest in there being an efficient and effective complaints procedure.
- 5.27 On the other hand, the Commissioner is aware that there is a strong public interest in allowing officials to provide and obtain full and frank advice. In this case, there is a clearly laid out complaint-handling procedure which requires public officials to thoroughly consider the issues before them. There is a reasonable likelihood that it will be necessary for public officials to seek and/or provide advice to resolve complaints properly. Such advice needs to be full and frank so that the complaint-handling process functions as effectively as possible.
- 5.28 It is also important when dealing with complaints that officials can freely and frankly discuss the issues which they raise. This should allow officials to consider all options as fully as possible in an independent space which is not subject to external influences. Complaints must necessarily be dealt with independently and impartially and therefore public officials need some space in which to exchange views for the purposes of deliberating on the complaint before them. Providing this space should prevent the complaint process from being subject to external pressures and therefore allowing impartial resolution of complaints.
- 5.29 In weighing up the competing factors in favour of disclosing and withholding the information refused under section 36, the Commissioner has concluded that, at the time the request was made, the public interest lay in favour of maintaining the exemption. This is explained further below.

Weighing the competing arguments

- 5.30 On the one hand, the Commissioner acknowledges that the complaints-handling process must be accountable and therefore there is a strong public interest in disclosing information which would allow the public to assess this. Having viewed the information, it is likely that some of the information would assist the public in assessing the effectiveness of the complaints procedure. On the other hand, the Commissioner recognises that an effective, thorough and impartial complaint-handling process is clearly in the public interest. The EHSSB has submitted that the timing of the information request is relevant and the Commissioner agrees with this assessment. Further, as stated in paragraph 5.8 above, there is no evidence to suggest that

the Ombudsman has not had access to information which would have materially affected his investigation.

- 5.31 All three sections of documents are relevant to the second complaint which was under consideration by the Ombudsman at the time the request for information was made to the EHSSB. The Commissioner therefore believes that the public interest in allowing officials to consider the complaint without outside interference is a compelling one. Officials have a duty to consider all options open to them and decide which of these is the most appropriate. It is likely that some options would, if released while an investigation into a complaint was ongoing, prejudice that investigation. Creating a right of access to information which may be related to a complaint in some way and could be used to try and influence the Ombudsman, thereby potentially affecting the independence and impartiality of the process is unlikely to be in the public interest.
- 5.32 The Commissioner recognises that public officials have a duty to consider all options open to a public authority or they would not be fulfilling their obligations. However, disclosure of the information requested while an investigation is ongoing is likely to make public officials more reluctant to provide full and frank advice in future and to affect their ability to freely and frankly discuss potentially sensitive issues when deliberating upon complaints. Even if advice / discussions were not affected, it is likely that the way in which advice / deliberations are recorded would be affected. Records may become less complete and some options may not be recorded at all. It is clearly in the public interest for accurate records of the decision-making process to be kept, so anything which affects this is not likely to be in the public interest.
- 5.33 The Commissioner has considered, as did the EHSSB, the timing of the request in reaching this conclusion on the public interest test. Where matters which relate to the information request are still ongoing this is likely to have a greater affect on the ability of officials to seek / provide free and frank advice or to discuss complaints in a free and frank manner for the purposes of deliberation or to record this in an accurate manner. However, where issues are no longer 'live' and a period of time has passed it is less likely to harm the ability of public officials to seek / provide advice or to discuss matters openly in the future, particularly given that the Act has created an expectation that more information from the public sector will be publicly accessible.
- 5.34 While the public interest at the time the request was made favoured withholding the information, the Commissioner is aware that this assessment would be likely to change over the course of time. The public interest in withholding the information is likely to lessen once ongoing complaints have been resolved in view of the likely reduction in the level of prejudice, while the public interest in ensuring that the proper procedure has been followed is likely to remain the same.

5.35 In view of this, the Commissioner believes that the public interest in withholding the information outweighed the public interest in disclosure because of the ongoing Ombudsman's investigation into the second complaint. In coming to this conclusion, the Commissioner is aware that once an investigation has been concluded the public interest in protecting the Ombudsman's ability to reach decisions without being subject to outside influences will diminish. Release of the requested information once investigations are complete would then serve the public interest considerations outlined above in favour of disclosure.

6. Action Required

6.1 In view of the Commissioner's decision that the EHSSB was entitled to rely upon sections 31 and 36 to withhold the requested information he does not require any steps to be taken.

7. Right of Appeal

7.1 Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 6000 877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

7.2 Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

Dated the 10 day of July 2006

Signed

**Phil Boyd
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF**