

Freedom of Information Act 2000

Decision Notice

Date 24 August 2006

Name of Public Authority: Surrey and Borders Partnership Trust (formerly Surrey Oaklands NHS Trust)

Address of Public Authority: Kingsfield Resource Centre
Philanthropic Road
Redhill
Surrey
RH1 4DP

Summary Decision

1. The complainant asked Surrey Oaklands NHS Trust ('the Trust') for a copy of a report of an investigation into the financial affairs of the Trust's predecessors, Lifecare NHS Trust. The Trust withheld the report, citing the exemptions in sections 31, 41 and 42 of the Freedom of Information Act. The Information Commissioner ('the Commissioner') decided that the Trust had correctly applied section 41 to the information in the report relating to allegations about individuals against whom charges were dropped or relating to individuals who gave evidence to the report's authors, the release of which would be an actionable breach of confidence. However, the Commissioner considered that the Trust had not correctly applied sections 31 and 42 to the remaining information in the report, which should be released to the complainant.

The Commissioner's Role

2. The Commissioner's role is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out that decision.
3. Section 50 of the Act provides that, 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 - the application has been withdrawn or abandoned,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.

4. 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.

The Request

5. On 20 January 2005 the complainant asked the Trust for the following information:

“A copy of the report on the financial affairs of Lifecare NHS Trust (‘Lifecare’). The report was carried out by Price Waterhouse Forensic Services in late 1998/early 1999, and was an investigation into the situation that led to the sudden demise of Lifecare in November 1998.”

(It was subsequently established that the report actually had been prepared by KPMG, and was completed in March 1999).

The complainant alleges that the Trust had incorrectly applied sections 31, 41 and 42 of the Act in withholding the report.

6. Having sought legal advice and consulted KPMG (who advised that the report should not be released because it was a privileged document, but who nevertheless said that the final decision rested with the Trust), on 15 February 2005 the Trust wrote to the complainant, declining to provide him with a copy of the report, saying that it fell within the terms of three of the Act's exemptions.
7. The Trust said, first, that the report was exempt from disclosure under section 41 of the Act on the basis that its disclosure would be an actionable breach of confidence where the report contained information and referred to documents provided to KPMG in confidence by those individuals whom KPMG had interviewed for the purposes of their investigation. Secondly, the report was exempt under section 42, as it was subject to litigation privilege; it had been prepared in the context of civil and criminal proceedings which had either been commenced at the time the report was contemplated or were in contemplation at that date. The Trust said that, in applying that exemption, it had balanced the public interest in withholding the report against the public interest in disclosing it, and had concluded that the balance of the public interest lay in non-disclosure. The Trust said that, in reaching that conclusion, it had taken into account the importance of the public interest in the proper administration of justice and, in that context, the great weight which had been given to the public interest in legal professional privilege. As to the third exemption, under section 31 (although the Trust do not specifically refer to it as such), the Trust said that it had again balanced the public interest in withholding the report against the public interest in disclosing it, and again had concluded that the balance lay with non-disclosure. The Trust said that it had taken account of the fact that the public interest in the prevention of crime extends to include information regarding confidential sources of information which may be relevant to the bringing of civil or criminal proceedings. It said that, if the complainant was dissatisfied with their decision, he could initiate a review and that, if he was still dissatisfied following that review, he could complain to the Commissioner.

8. On 18 February 2005 the complainant asked the Trust to review their refusal to provide him with a copy of KPMG's report. On 14 March 2005 the Trust replied. It said that, for the reasons given in their letter of 15 February 2005, it was upholding their refusal to release to the complainant the information he sought.
9. In seeking the Commissioner's intervention, the complainant said that the court case to which the Trust alluded in their letter of 15 February 2005 had taken place in 1999, with one individual (who had subsequently died) receiving a prison sentence. He said that the former Chief Executive of Lifecare was also now dead and that, as far as he (the complainant) was aware, other senior staff were no longer employed at the Trust. The complainant said that he was asking for a copy of the report because he had worked for Lifecare and, following the takeover by the Trust, the incoming Chief Executive of the Trust had said that each member of staff would receive a summary of the report: this, however, had not happened.

Relevant statutory provisions

10. **Section 31(1)(a)** provides:-

"Information which is not exempt information by virtue of section 30 is exempt information if disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime, "

11. **Section 41(1)** provides:-

"Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

12. **Section 42 (1)** provides:-

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."

The Investigation

13. Having received a copy of the report from the Trust the Commissioner asked them, in the light of the complainant's comments (paragraph 9), if there had been an undertaking to issue a summary of the report to staff, and whether this had been done; if so, could a copy now be sent to the complainant; if not, were the Trust willing to prepare one and to provide the complainant with it. The Commissioner also asked whether all court proceedings had been concluded, and for details of the extent to which the information contained in the report had been revealed during those court proceedings.
14. In response, the Trust provided evidence which confirmed that a summary had been promised but that, following a question from the complainant in August 1999, he was told that the nature of concerns surrounding the alleged Lifecare management irregularities and alleged fraud had been fully discussed and that the Trust had given as much information as it could without compromising any legal action which would be taken. It told the complainant that, if the situation changed, it would notify interested parties. As to the court proceedings, the Trust said that the case against the individual in question had resulted in a guilty plea, so it was unlikely that much of the detail had entered the public domain by that route. The Trust said that all court proceedings had now been concluded. It said that the Trust had issued a press release, and that the case had been reported in the press at the time. It considered that any summary prepared now would not add anything to that information.
15. Since the press release did not give details of KPMG's key findings, the Commissioner asked the Trust to provide copies of any press articles which publicised that information. The Commissioner also asked, if the press articles were no longer available, whether the Trust would be willing to issue to the complainant a copy of the key findings section of the executive summary at paragraph 2.1.2 of the report (redacted, where necessary). In response, the Trust said that advice from their Local Counter Fraud Specialist was to the effect that the majority of paragraph 2.1.2 of the report was still sensitive and not in the public domain, and that it should not therefore provide the complainant with either a copy or a redacted version.
16. Since the Trust found themselves unable to issue a summary of the report to the complainant which, in the light of the wording of his complaint to the Commissioner, might well then have satisfied his requirements (although this is no longer the case), the Commissioner found it necessary to consider whether the Trust acted correctly in refusing to provide the complainant with a full copy of the report.

Analysis and decision

17. Insofar as the information in the report relates to individuals who were investigated but against whom no action was taken, or relates to individuals who gave evidence to the report's authors, the Commissioner considers that to release that information would be likely to constitute an actionable breach of confidence. Section 41

provides an absolute exemption from the provisions of the Act, and is not subject to the public interest test. The Commissioner therefore considers that the Trust have correctly applied section 41 of the Act, and are entitled to withhold that information.

18. As to the remaining information in the report, although the Trust have cited sections 31 (relating to law enforcement) and 42 (relating to legal professional privilege) as applying to that information, it have failed to identify which exemption relates to which part of the report and have applied a blanket approach. At the time of the complainant's request for information the report was almost six years old. Given the passage of time, and the fact that all legal action has been completed, the Commissioner has concluded that the public interest is best served by the release of the remaining information. He is pleased to be able to say that the Trust have now expressed their willingness to provide the complainant with that information.

Steps required

19. The Commissioner requires the Trust to take the following steps to ensure compliance with the Act:

To disclose to the complainant the information in the report which does not relate to individuals who were investigated but against whom no action was taken, or to individuals who gave evidence to the report's authors, within 35 days of the date of issue of this Notice.

Right of appeal

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

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

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

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

Dated the 24th day of August 2006.

Signed.....

**Graham Smith
Deputy Commissioner**

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