

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 5 August 2008

Public Authority: Lambeth PCT
Address: 1 Lower Marsh
London
SE1 7NT

Summary

The complainant requested information about inquiries and investigations carried about by a Convenor. The public authority refused to disclose the information relying upon the sections 21,36,40 and 41 exemptions to various parts of the request. It also claimed that it did not hold some of the requested information. The Commissioner decided that all the information that it did hold was exempt from disclosure under section 41 of the Act. However he also decided that the public authority incorrectly applied section 21 of the Act

The Commissioner's Role

1. The Commissioner's duty 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 his decision.

The Request

2. On 26 January 2006 the complainant made the following request: *'My request concerns the inquiries and investigations conducted by [the named] Convenor in response to my request, under the NHS Complaints procedure, for an independent review of my complaint against [named] hospice. The request was made on 18 February 2005 and I received a decision from the Convenor in a letter dated 12 January. In particular I wish to obtain the following:*
 - 1) *A copy of the report commissioned by Ms Evelyn Dunwoody from the professional adviser. This is the report referred to in a letter to myself from [named] Complaints Manager, dated 16 September 2005;*

- 2) A copy of any report or written advice from the physician consulted by the Convenor, as referred to in the letter dated 12 January 2006, and any notes or memoranda concerning this advice made by the Convenor, whether in written or electronic form;*
- 3) A copy of any report or written advice from the "person experienced in management and administrative affairs" as referred to in the letter dated 12 January 2006, and any notes or memoranda concerning this advice made by the Convenor, whether in written or electronic form;*
- 4) The names and qualifications and relevant antecedents of the individuals who provided the advice to the Convenor. In particular, I request information concerning the expertise of the physician on hydration and sedation in elderly terminally ill patients and expertise in palliative care and if the physician is practising in palliative, at which institution and if the person is a member of any professional bodies relevant to palliative care and hospices;*
- 5) Information, whether in hard copy or electronic form, concerning any inquiries made by the Convenor concerning whether her advisers had any conflict of interests, or any links with [the named hospice], formal or informal, through past employment or membership of bodies which would bring them into contact with persons employed by [the named hospice]'.*
3. On 15 March 2006 the public authority declined to disclose the information relying upon the sections 21, 40, 41 and 36 exemptions.
4. It confirmed that it held two reports covered by points 1 to 3 of the complainant's request. These reports were from a physician experienced in the care of patients of a hospice and the other from a person experienced in the management and administrative affairs of a hospice. It explained that it did not hold any other notes or memoranda as defined in point 3 of the complainant's request. It stated that it considered the information contained within the reports was information reasonably accessible to the complainant by other means as it had been compiled from documents that the complainant already had received from an earlier part of the complaint process. It therefore claimed this information was exempt under section 21 of the Act. It also argued that the reports were covered by a duty of confidence and therefore claimed the reports were exempt under section 41 of the Act. Finally it added that the Chief Executive of the public authority considered that disclosure of these reports would also be likely to inhibit the free and frank provision of advice as the individuals concerned agreed to provide their opinions reports on the basis that they would not be disclosed otherwise than in the form of the Convenor's response. It then went on to provide its public interest arguments as to why it considered the public interest in maintaining the exemption outweighed the public interest in disclosure. It did not however state that it was applying section 36 to this information.
5. In relation to point 4 it provided the complainant with the only information it held about the qualifications of the physician but denied having any information in relation to any other qualifications and relevant antecedents of the individuals concerned. It also declined to provide the names of the individuals on the basis

that this was exempt under section 41 of the Act and also under section 40.

6. Finally it denied holding any information in relation to point 5 of the request. It explained that if the complainant was unhappy with its response he could complain to it under its FOIA complaints procedure, providing a contact name.
7. On 20 March 2006 the complainant requested an internal review and made the following request for information: *'full information on the appeals procedure, including any deadlines for appeals to be made after a full response to an FOI request has been made'*.
8. On 28 March 2006 the complainant contacted the public authority to complain that it had not acknowledged his request for an internal review nor sent him any information on its appeals procedure, as requested.
9. On 3 April 2006 the complainant contacted the public authority again to request an internal review.
10. On 21 April 2006 the public authority contacted the complainant and informed him that it was not required by mandate, nor did it have an appeals process within its Freedom of Information processes. The public authority also informed the complainant that he could complain to the Information Commissioner.

The Investigation

Background

11. In 2002 the complainant complained to the public authority under the NHS Complaints procedure about the care his mother received in a particular hospice. Under the 1996 Directions to NHS Trusts, a non-officer known as a convenor was appointed to investigate his complaint. As part of her review she commissioned two reports from professional advisers, who did not work for the public authority. On receiving the convenor's conclusions the complainant made his request for information of 26 January 2006 to the public authority.

Scope of the case

12. On 7 April 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - the public authority's lack of clarity about its appeals procedures
 - the public authority's initial lack of response to the complainant's request for an internal review and,
 - the length of time it took the public authority to inform the complainant that it did not after all have a complaints process for FOI complaints.

13. The Commissioner notes that in its refusal notice of 15 March 2006 the public authority explained that if the complainant was unhappy with its response to his request for information, he could complain under its FOIA complaints procedure. However, when the complainant did this, the public authority did not respond initially and subsequently claimed that it did not have an FOI complaints process.

Chronology

14. On 11 June 2007 the Commissioner contacted the public authority to clarify the position regarding its complaints procedure. The public authority did not provide the requested clarification.
15. On 13 and 14 June 2007 the Commissioner contacted the public authority for further clarification about its appeals procedures.
16. On 26 June 2007 the Commissioner contacted the public authority requesting that it carried out an internal review. Whilst the Commissioner recognises that it is not a requirement of the Act for a public authority to have an internal review procedure, in requiring it to do so, he was endeavouring to attempt an informal resolution of the complaint. This issue is considered further at paragraph 50 and 51 in the other matters section of this notice.
17. On 13 July 2007 the public authority carried out the internal review. It upheld its original decision on the same grounds i.e. that it was applying the section 21 and 41 exemptions to points 1,2,3 of the request and section 40 and 41 to point 4 of the request, in addition to making reference to the section 36 exemption to point 3.
18. In relation to point 3 the public authority again confirmed that it held two reports compiled by the physician and the professional advisor, and that it did not hold any other notes or memoranda whether written or in an electronic form from the advisors. It confirmed that it considered the reports were exempt under section 41 of the Act and again made reference to the section 36 exemption but did not specifically cite it.
19. In relation to point 4 the public authority again confirmed that the physician was recorded as having a "MD FRCP" qualification but denied having any information in relation to any other qualifications and relevant antecedents of the individuals concerned. It declined to provide the names of the individuals concerned on the basis of section 41 of the Act in that this information was provided to the public authority in confidence and its disclosure could expose the public authority to an actionable breach of confidence. It also repeated its assertion that this information was personal data.
20. In relation to point 5 *'Information, whether in hard copy or electronic form, concerning any inquiries made by the Convenor concerning whether her advisers had any conflict of interests, or any links with [the named hospice], formal or informal, through past employment or membership of bodies which would bring them into contact with persons employed by [the named hospice]'* the public authority explained that although it did not hold the requested information, the

authors of the reports were sourced from or approved by, the former South East London Strategic Health Authority (SELSHA).

21. On 21 August 2007 the Commissioner contacted the public authority for clarification regarding any assurance of confidentiality given to the authors of the reports.
22. The Commissioner also asked the public authority in December 2007 to clarify whether it held the information requested by the complainant in point 3 and 4 of the complainant's request as he did not consider that this was entirely clear from its response.
23. The public authority confirmed to the Commissioner that the Convenor did not hold any paper records or memoranda relating to the Convenor's report in relation to point 3 of the request. The Convenor confirmed that she never held any separate papers in her role, but solely used the reports from the two experts to form her opinion and draft her overall report. The public authority also confirmed that it did not hold any information about the qualifications of the relevant antecedents of the individuals providing the advice to the Convenor other than that provided about the physician. It commented that it used experts coordinated by the then SELSHA, which has now disbanded. No information could be obtained on how these experts were recruited (i.e. self nominated or sought locally) from the current SHA, as they do not hold this information.

Analysis

24. The Commissioner will now deal with this case by firstly considering the procedural aspects of the complaint. He will then consider the public authority's use of the sections 21, 40, 41 and 36 exemptions including its application of the public interest test where necessary. A full text of the relevant statutes referred to is contained in the legal annex.

Procedural matters

Section 1 - Information held or not held

25. Under section 1 of the Act, a public authority is under a duty to inform a person who requests information whether it holds the requested information. The public authority informed the complainant that it held some of the information in relation to the five parts of his request.
26. In responding to point 3 of the request the public authority confirmed in its internal review response and subsequently to the Commissioner following his request for clarification in December 2007 that it held two reports but that it did not hold any notes or memoranda concerning the advice made to the Convenor. Having considered the responses of the public authority the Commissioner is satisfied that no other information is held in relation to point 3.

27. In responding to point 4 of the request the public authority also confirmed in its internal review response that it held the name of the physician who provided that advice to the Convenor and provided information about the physician's qualifications. However it clarified that it held no other information about the qualification of the relevant antecedents of the individuals who provided the advice to the Convenor. In considering its response to the complainant and its subsequent response to the Commissioner, the Commissioner is satisfied that the public authority holds no further information in respect of this aspect of the request.
28. In relation to point 5 the Commissioner notes that the public authority has also confirmed that it did not hold any information within the scope of this part of the complainant's request. Having considered the response of the public authority the Commissioner is satisfied that it does not hold this information.
29. The Commissioner has commented in the other matters section of this decision on the failure of the public authority to consider informing the applicant that information falling within the request may be held by another public authority.

Section 17 – Refusal of request

30. Section 17 (1) of the Act provides that where a request for information is refused upon the basis of an exemption, the public authority must explain which exemption(s) have been relied upon within the time for complying with section 1(1). Where it would not otherwise be apparent the public authority must also explain why the exemption is being relied upon. The public authority provided its refusal notice well outside the twenty working days specified in the Act. Furthermore although the public authority did state some of the exemptions it sought to rely upon in its refusal notice, the Commissioner is of the view that it did not state with sufficient clarity that it was relying upon the section 36 exemption. This was also a breach section 17(1)(b) and (c) of the Act.
31. Accordingly the Commissioner finds that the public authority has failed to meet the obligations imposed upon it by section 17(1) of the Act.

Exemptions

Section 21- Information accessible to the applicant by other means

32. Section 21 of the Act provides an exemption from disclosure if requested information is reasonably accessible to the applicant by other means.
33. The public authority applied the section 21 exemption as it maintained it had disclosed the requested information to the complainant in a letter from the convenor to the complainant in 2006.
34. However the Commissioner has established that the information contained in the letter only summarised the outcome of the internal enquiries. Following subsequent disclosure to the Information Commissioner it is clear that the public authority held more information than it sent to the complainant in 2006.

35. Accordingly the Commissioner finds that public authority was incorrect to apply the section 21 exemption of the Act.

Section 41 – information provided in confidence

36. Section 41 of the Act provides an exemption from disclosure if the information was obtained from any other person (including another authority) and disclosure would constitute an actionable breach of confidence.
37. When considering whether the section 41 exemption applied to the requested information the Commissioner must determine whether the information was obtained by the public authority from any other person (person in this sense means a legal person). The Commissioner notes that section 41 has been applied to not only the reports themselves but also to the names of the individuals requested in point 4 of the complainant's request. These individuals provided the advice to the Convenor and their names will be quoted in the reports. Having seen the withheld information the Commissioner is satisfied that the information was provided by another person, in this case the two authors of the reports.
38. The Commissioner then proceeded to consider whether disclosure of the information would give rise to an actionable breach of confidence. In order to establish this, the Commissioner considered the case of *Coco v Clarke [1969] RPC 41* which dealt with the requirements of confidentiality and established that the information in question must have the necessary quality of confidence; be imparted in circumstances giving rise to an obligation of confidence; and there is an authorised use of the information.
39. The Commissioner is satisfied that the two reports in question were not publicly accessible. He has considered the exempt information and is also satisfied that it is not trivial in nature.
40. The Commissioner is also satisfied that in relation to the quality of confidence the ingredients of the test of confidence are satisfied in that the reports were compiled to assist the convenor in reaching her decision and the authors were given assurances of confidentiality.
41. Section 41 is an absolute exemption and therefore not subject to the public interest test. However, the Commissioner recognises that he must also consider whether or not there is an overriding public interest defence to any such breach. If there is such an overriding public interest defence then the breach would no longer be considered actionable. This follows the approach taken in the Tribunal case of *S v ICO & General Register Office EA/2006/0030* in which the public interest was taken as an integral component of whether a disclosure would be an actionable breach. The Commissioner has therefore considered whether there was an overriding public interest in disclosure at the time of the request.
42. The Commissioner recognises that there is a public interest in public authorities being open and transparent about their processes, including any internal inquiries/investigations they conduct.

43. Further, the Commissioner recognises that the public should be able to have confidence in the medical profession, including how it deals with any complaints it receives from the public about the care given in medical establishments, including hospices.
44. However the Commissioner also recognises that public authorities need to be able to investigate complaints from the public; and if necessary to be able to commission the opinions of others to assist it to do so.
45. The Commissioner is also mindful of the public interest in ensuring that people who are asked to provide such information are not discouraged from expressing their views by the possibility of the information being made public.
46. Further when information relating to inquiries or investigations carried out by public authorities is given to a public authority in confidence, there is a legitimate expectation that this confidence will be protected by that authority. Without this expectation, people might be less willing to provide their views.
47. For the reasons discussed above, the Commissioner is satisfied that there is no overriding public interest in disclosure of the requested information. Therefore the information was correctly withheld by the public authority by virtue of the section 41 exemption.
48. The Commissioner recognises that some of the information would have constituted personal data and therefore be exempt under the section 40 exemption. However as he considers that the section 41 exemption applies to all of the requested information, he does not need to consider the section 40 or section 36 exemptions.

The Decision

49. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
 - the application of the section 41 exemption.
50. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - section 17 in that the public authority did not respond to the complainant within the 20 working day limit and did not clearly specify the exemptions it was relying on.

Steps Required

51. The Commissioner requires no steps to be taken.

Other Matters

52. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
53. As described in paragraph 7 of this Decision Notice, Lambeth PCT wrote to the complainant on 21 April 2006 and stated that "The PCT is not required by mandate, nor has in place an appeals process within its Freedom of Information processes". The Commissioner accepts that the provision of a complaints procedure is not statutory but reminds the public authority that Part VI of the section 45 Code of Practice recommends that public authorities should have such a procedure in place.
54. Furthermore, the Commissioner is particularly concerned that the above statement appears to contradict both its earlier correspondence with the complainant and the public authority's own policy on the Act which is published online. Although this may have been modified since April 2006, section 8 of this policy states: "Lambeth PCT is required to have a Complaints Procedure, which must be explained to the applicant when a response to a request is made (including that their request has been received)."
55. In reviewing the public authority's website, the Commissioner also notes that although reference is made to public authority's publication scheme, the scheme itself does not appear to be available online. The Commissioner is aware that the PCT have adopted a scheme and considers that publication via this medium would maximise access to this information. He therefore recommends that it be made available on the authority's website as soon as possible.
56. The public authority explained that it did not hold the information requested in point 5 of the request for information. However it did not explain to the complainant where the information might be held, when it had an understanding that the information might be held by the SHA. The Commissioner would like to remind the public authority of Part III of the section 45 Code of Practice 'Transferring requests for information'. Paragraph 17 states that: '*If the authority has reason to believe that some or all of the information requested, but which it does not hold, is held by another public authority, the authority should consider what would be the most helpful way of assisting the applicant with his or her request.*'

Right of Appeal

57. 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 5th day of August 2008

Signed

Steve Wood
Assistant Commissioner

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

Legal Annex

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.

Section 1(2) provides that -

Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

Section 1(3) provides that –

Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

Section 1(4) provides that –

The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

Section 1(5) provides that –

A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).

Section 1(6) provides that –

In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

Section 17(1) provides that -

A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

Section 21(1) provides that –
Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

Section 21(2) provides that –
For the purposes of subsection (1)-

- (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
- (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

Section 21(3) provides that –
For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

Section 41(1) provides that –
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.

Section 41(2) provides that –
The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.