

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 18 October 2010

Public Authority: Mid Staffordshire NHS Foundation Trust
Address: Stafford Hospital
Weston Road
Stafford
ST16 3SA

Summary

The complainant requested a copy of a risk management plan drawn up by Mid Staffordshire NHS Foundation Trust (the "Trust") that took account of the changes taking effect in the lead up to the authority acquiring foundation status. In response, the Trust claimed that it did not hold the plan. The Commissioner considers that there are strong arguments for concluding that such a document may be held. However, the Commissioner has decided that, on the balance of probabilities, the surrounding evidence has pointed in favour of the Trust's position.

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.

Background

2. The Mid Staffordshire NHS Trust (the "Trust") was awarded foundation status on 1 February 2008. NHS foundation trusts are independent public benefit corporations. Although remaining part of the NHS, they are free from central Government control and are not subject to performance management by strategic health authorities.

3. Prior to it gaining foundations status, the Trust was required to make a saving of £10 million. The Trust decided that this could only be managed through cutting staff levels, which were already insufficient¹.
4. The Trust has subsequently attracted a great deal of controversy and opprobrium because of the high mortality rates at the authority and the resultant findings by independent inquiries of the neglect of patients. These inquiries blamed not only understaffing for the problems but also the poor management of key staff.

The Request

5. On 9 April 2009, the complainant submitted the following request to the Trust:

“PREPARATION FOR FOUNDATION TRUST & IMPLEMENTATION OF CHANGES – FOI REQUEST FOR ASSOCIATED RISK ASSESSMENT, AUDIT DOCUMENTS and NAMES of PERSONNEL RESPONSIBLE for CHANGES

1) Preparation for Foundation Status Activities

Prior to Mid Staffordshire NHS Trust acquiring Foundation status, the trust management implemented a cost improvement (reduction) plan of £10million from a £120m annual income. This included:

- a) A cut in the numbers of staff*
- b) Adoption of new work practices*

2) Request for Copy of Risk Assessment and Associated Documents – FOI Request

In relation to the reduction in staff, change of working practices and £10 million cost reduction, would you please provide a copy of:

- a) The detailed Cost Improvement Plan*
- b) The detailed Risk Assessment carried out prior to the decision to proceed with the staff reduction (including impact on patients).*
- c) The Risk Register or Risk Management plan developed to deal with the identified risks*

¹ Independent Inquiry into care provided by Mid Staffordshire NHS Foundation Trust: January 2005 – 2009, Chaired by Robert Francis QC

- d) Actions taken to reduce the problems created by the staff reductions*
- e) Details of the new working practices that were designed to allow a safe reduction of the workforce together with implementation programme*
- f) The detailed training programme for the staff that would have to adopt the new working practices.*
- g) The Audit Programme for the period of the major changes and cost reduction together with any findings, including Clinical Audits*
- h) The formal assessment and approval procedure for implementing these changes including approval or review by PCTs (commissioners) and the Strategic Health Authority.*

3) Personnel Responsible for Changes

Would you also advise:

- a) Who was responsible for preparing the Risk assessments (clinical & non-clinical) and the other documents I have requested.*
 - b) Who was responsible for implementing the changes*
 - c) Who was responsible for auditing the changes."*
6. The Trust responded to the request on 28 May 2009 by providing information that it considered satisfied each part of the request.
 7. On 17 July 2009 the complainant emailed the Trust a list of the outstanding items he considered should have been provided to him.
 8. Although the Trust acknowledged the complainant's dissatisfaction, it failed to carry out a review of its response in a timely fashion. Having had this matter brought to his attention, the Commissioner wrote to the Trust on 30 September to instruct it to undertake an internal review.
 9. The Commissioner understands that a series of communications took place between the complainant and the Trust. As part of the exchange, the Trust provided the complainant with a copy of the risk register requested as part of 2)c) of the original request.

The Investigation

Scope of the case

10. On 11 December 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. Specifically, in coming to the Commissioner, the complainant highlighted the failure of the Trust to provide the risk management plan referred to in part 2)c) of his request. The Commissioner has therefore proceeded on this basis.
11. In the latter stages of the Commissioner's investigation, the complainant has raised the possibility that other parts of his original request should be included as part of the Commissioner's adjudication. However, because of its late notice, the Commissioner has not considered this application to be reasonable and has therefore limited the scope of the notice to the Trust's response to part 2)c).

Chronology

12. On 29 January 2010 the Commissioner telephoned the complainant. As part of the discussions, the complainant set out some of the reasons why he considered that a risk management plan would be held.
13. The Commissioner wrote to the Trust on 3 February 2010 with his preliminary questions regarding the extent of its searches for the information in question. The Trust responded the following day.
14. The Commissioner subsequently emailed the complainant on 10 February 2010 to illustrate his findings up to that point. The complainant informed the Commissioner of his disagreement with his assessment on 14 March 2010, submitting a variety of supporting evidence to support his view.
15. Further to the complainant's submissions, the Commissioner wrote to the Trust on 23 March 2010 to ask that it address a number of additional queries relating to the matter. The answer to these queries was provided to the Commissioner on 15 April 2010. As part of its response, the Trust provided both the Commissioner and the complainant with a copy of an assurance register which the complainant had referred to in his arguments. For the avoidance of doubt, the assurance register represents a separate document to the risk register.

16. On 18 May 2010 the Commissioner emailed the Trust to summarise his understanding of the authority's position in this matter. In an email of 25 May 2010, the Trust confirmed that the Commissioner's reading was accurate.

Analysis

Procedural Matters

Is the requested information held by the public authority?

17. Section 1(1) of the Act 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"*

18. Where there is any contention about whether or not information is held by a public authority, the Commissioner has been instructed by the approach adopted by the Information Tribunal in the case of *Linda Bromley & Others and the Information Commissioner v the Environment Agency (EA/2006/0072)*.

19. In this case, the Tribunal indicated that the test to be applied was not one of certainty but rather is the civil standard of the balance of probabilities. Therefore, a decision will *"take into account the scope, quality, thoroughness and results of the searches"* carried out by the public authority as well as considering, where appropriate, any other reasons offered by the authority to explain why the information is not held.

20. In approaching the question of whether the Trust holds the requested information, the Commissioner has become aware that the Trust and the complainant have come to hold differing interpretations of the request. These interpretations were:

- I. Information that documented a risk management plan that would take account of the changes that took place – specifically, the reduction in work force, change of working practices and £10 million cost reduction – in the lead up to the authority acquiring foundation

status in February 2008. This information would be distinct from the data contained in a risk register.

II. Evidence to show that any risk management plan had been drawn up by the Trust and was an ongoing concern.

21. In his communications with the Commissioner, the complainant has suggested that he meant the interpretation set out under part II above. While the difference between the interpretations may not appear overly significant, it is nevertheless clear that the information captured by part II would be potentially far broader.
22. Where a public authority is aware that an information request can be objectively read in more than one way, it will have a duty under section 16 of the Act to assist the complainant in clarifying the request. However, where a public authority considers that there is only one objective reading of request, the duty under section 16 does not arise.
23. In this instance, the Commissioner is of the view that the Trust could not be reasonably expected to have read the complainant's request in the terms described at part II. This is because, firstly, the complainant's request is predicated on the issues leading up to the Trust gaining foundation status, specifically those created by the reduction in staff, change of working practices and £10 million cost reduction. Secondly, the original request did not indicate that the complainant was seeking clarification that the risk management plan, if it existed, was still being maintained. The Commissioner has therefore accepted that an objective interpretation of the request is as articulated at part I.
24. Nevertheless, the Commissioner recognises that there are cogent arguments for considering that the risk management plan as described at part I would be held by the Trust.
25. The principal such argument is the Trust's concession that there would be a statutory requirement to hold such a plan under the Health and Safety at Work Regulations 1992. This legislation takes effect because the reduction of staff and the preparation for foundation status would have been likely to have an impact on the health and safety of both patients and staff. This requirement is reinforced by the NHS' own guidance on risk management. Ultimately, the Trust should be in possession of a risk management plan addressing the factors listed by the complainant in order that there is a clear audit trail for the management of change.

26. As part of his submissions, the complainant has also pointed to the following factors as evidence that a risk management plan had been produced and would be retained:
- i. 'Safeguard', the electronic risk management software system used by the Trust, was specifically designed to record incidents of risk and draw up plans to alleviate or lessen these risks.
 - ii. The references, both directly and indirectly, to a risk management plan in minutes of the Trust dated 3 August 2006 and 1 February 2007. Specifically, the minutes spelt out a commitment by the Trust to finalise a governance strategy, risk strategy and an assurance register that would work towards a coherent risk plan being put in place.
 - iii. The requirement for the Trust to provide the NHS Litigation Authority (NHSLA) with risk management plans in order to secure membership of its Clinical Negligence Scheme for Trusts (CNST). This handles all clinical negligence claims against member NHS bodies where an incident took place on or after 1 April 2005.
27. The Commissioner has confirmed with the Trust that a distinction has been drawn between a risk register, which identifies specific risks associated with the performance of the Trust, and a risk management plan, which would seek to resolve the broader issues underpinning these risks. The Commissioner is also aware that although the Trust is unable to state definitively that the requested risk management plan was never produced – instead, only committing to its position that the plan was not held at the time of the request – the staff at the Trust who have fielded the Commissioner's enquiries have suggested that the evidence points to this being the case.
28. The Trust has explained that, in order to confirm whether a risk management plan was held, it has contacted a number of key staff, including the Deputy Chief Executive, the Chief Operating Officer, Divisional managers and the Head of Governance. All these individuals checked their own electronic and manual folders. While the Chief Executive in post at the time that the Trust acquired foundation status has left the authority and could therefore not be questioned, the Trust has asserted that, if a risk management plan did exist, the likelihood would be that one of the aforementioned officials would hold a copy.
29. As part of its broader searches for the information, the Trust also confirmed that it had undertaken searches of its electronic data, including both personal and networked folders. To refine its search, the Trust used the search terms: "*Risk*"; "*Cost Reduction*"; "*Workforce*

Reduction"; "Change Management"; and "CIP" (Cost Improvement Programme).

30. The Commissioner is prepared to accept that the extent and direction of the searches carried out by the Trust were appropriate, particularly given the seniority of the officials contacted. Nevertheless, the Commissioner has asked the Trust to respond to the points set out at paragraph 26 above.
31. Regarding the use of its 'Safeguard' system, listed as point i above, the Trust has commented that the software does not have the capability to produce an over-arching risk management plan but instead logs specific, localised data on identified risks. In any event, the Trust stated that the 'Safeguard' system was not in widespread use in the period approaching the Trust's acquisition of foundation status.
32. Turning to point ii, the Trust agreed that there had been a commitment to finalise a coherent risk plan, which had resulted in an assurance framework being produced in June 2007. However, owing to problems in the way that the overall project was overseen and implemented, the management of risk had not been fully integrated into this system at the period in question. This therefore militated against the requested risk management plan being developed.
33. Relating to point iii, the Commissioner understands from the NHSLA website² that, in order to be part of the CNST, individual members must contribute towards the scheme. These contribution levels:

"...are influenced by a range of factors, including the type of trust, the specialities it provides and the number of "whole time equivalent" clinical staff it employs. Discounts are available to those trusts which achieve the relevant NHSLA risk management standards and to those with good claims history."

34. The NHSLA risk management Standards are divided into three "levels": one, two and three, with level three involving more frequent and rigorous assessments but offering the biggest discount to the CNST contribution if achieved. The Commissioner has been informed that the Trust secured level 3 status in 2004 and level 2 in 2007.
35. As part of the evaluation process, the Trust confirmed that:

² <http://www.nhsla.com>

"The [NHSLA] Assessor spends 2 days at the Trust reviewing the evidence which is held in an electronic database containing hyperlinks to trust systems such as the intranet.

The assessors will then interview nominated staff in relation to each of the criterion and submit supply [sic] additional information. The assessor will also make visits to departments to review how the systems and processes are implemented."

36. Although the Trust reviewed the information provided to the NHSLA as part of the assessment, it has been unable to locate any records which it considered would satisfy the complainant's request.
37. In light of the explanations given by the Trust, the Commissioner believes that the three points raised by the complainant have been satisfactorily addressed for the purposes of his enquiries. The Commissioner notes that, in forming this view, he does not offer any opinions on the way in which the Trust previously operated but has concentrated solely on whether the requested information is held for the purposes of the Act.
38. In coming to his decision that the risk management plan is not held, the Commissioner has also taken account of the fact that the Trust had been required to carry out an intensive trawl of the information it did retain for the investigation carried out by the Healthcare Commission (HC)³, the findings of which were published in March 2009. At no stage, the Commissioner is led to believe, was the HC provided with a risk management plan in the form requested by the complainant.
39. The HC investigation itself took place between March 2008 and October 2008, with the remit of exploring the *"apparently high mortality rates in patients admitted as emergencies to Mid Staffordshire NHS Foundation Trust since 2005."*
40. As part of the report, under the heading *"Factors at a strategic level to reduce risk and protect the safety of patients"*, the HC explored whether senior managers at the Trust had arrangements in place to reduce risk and protect the safety of patients, and the quality of these arrangements.
41. The HC noted that the Trust's risk register, which has been supplied to the complainant, is a way for trusts to record and grade risks in terms of their seriousness. Having studied the 2006, 2007 and 2008 registers, the HC found that the 2006 register held comparatively few

³ http://www.cqc.org.uk/_db/_documents/Investigation_into_Mid_Staffordshire_NHS_Foundation_Trust.pdf

entries. However, as the registers became more widely utilised, the 2007 and 2008 registers both included references to the difficulties and risks associated with the shortage of staff. However, while the HC commented that information had been supplied which showed what the divisions had considered were the risks of the reduction of workforce in 2006/07, it added that:

"We could not find any evidence at a corporate level that the trust considered these risks."

42. The Commissioner would therefore consider that the HC's findings would seem to tally with his own as to the Trust's position in this matter.
43. As indicated previously, the Commissioner recognises that there are compelling arguments for assuming the requested information would be held by the Trust. However, when assessing the relative submissions from both parties, the Commissioner is mindful that his decision need only be based on a balance of probabilities. Based on the explanations offered by the Trust, the Commissioner has determined that, on balance, the Trust was correct to state that it did not hold the requested information at the time of the request.

The Decision

44. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

45. The Commissioner requires no steps to be taken.

Other matters

46. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
47. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing

with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'⁴*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.

48. The Commissioner is concerned that in this case, despite his prompting on this issue and the publication of his guidance on the matter, the Trust has apparently failed to carry out a recognisable review that took account of all the outstanding features of the complaint. The Commissioner would therefore expect the authority to follow the recommendations set out in his guidance when processing requests in the future.

⁴http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/time_limits_in_ternal_reviews.pdf

Right of Appeal

49. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

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

Dated the 18th day of October 2010

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Freedom of Information Act 2000

Right of Access

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.