

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 5 April 2011

Public Authority: Warrington and Halton Hospitals
NHS Foundation Trust
Address Executive Offices
Kendrick Wing
Warrington Hospital
Lovely Lane
Warrington WA5 1QG

Summary

The complainant requested a copy of the current Trust risk register and associated risk management plan as held by Warrington and Halton Hospitals NHS Foundation Trust (the Trust). The Trust has disclosed the risk management plan but withheld the risk register citing section 36(2)(b)(ii) of the Act.

The Commissioner finds that that the exemption under section 36(2)(b)(ii) was engaged but decided that the public interest in maintaining the exemption did not outweigh the public interest in favour of disclosing the information. The Commissioner also recorded a number of procedural breaches in relation to the Trust's handling of this request.

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. Warrington and Halton Hospitals NHS Foundation Trust is an acute hospital incorporating two hospital sites that lie 11 miles apart. The Trust's Chief Executive, as Accountable Officer has overall responsibility for ensuring the implementation of an effective risk

management strategy across the organisation. The Trust Risk Register identifies risks against the Trust's strategic objectives including patient safety and financial risk. The Trust Risk Register is reviewed annually and monitored on a quarterly basis by the Trust's Governance Committee and the Trust Board.

The Request

3. On 13 April 2010, the complainant made the following request to the Trust:

"I would like to request an electronic copy, followed by a paper copy of the current Trust Risk Register under the FOI Act 2000 together with the associated Risk management Plan...."

4. On 11 May 2010, the Trust issued a refusal notice to the complainant advising it had elected not to disclose the information requested on the basis that disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation, citing section 36(2)(b)(ii) of the Act (Prejudice to effective conduct of public affairs).
5. On 11 May 2010, the complainant requested an internal review of the Trust's decision not to disclose the information requested.
6. On 26 May 2010, the Trust wrote to the complainant to advise of the outcome of the internal review which upheld the Trust's original decision to withhold the requested information on the basis of the exemption at section 36(2)(b)(ii) of the Act.

The Investigation

Scope of the case

7. On 4 June 2010, the complainant contacted the Commissioner complaining about the Trust's decision not to supply the information requested. The complainant did not specify any particular issues with the handling of his request therefore the scope of the Commissioner's investigation will include the Trust's handling of this case, the application of the exemption claimed and the balance of the public interest as it applies to the qualified exemption.
8. Having reviewed the withheld information in this case, the Commissioner noted that the Trust had only scoped the Trust's risk register into the request and failed to include the associated risk

management plan which in this case related to a document entitled "*Risk Management Strategy, a Framework for the Assessment and Management of Risk*". The Trust has advised the Commissioner this was an oversight on its part and on 16 March 2011 it disclosed this document in full to the complainant. The late disclosure of the risk management plan is dealt with in the procedural issues section of this Notice.

Chronology

9. On 22 July 2010, the Commissioner wrote to the Trust advising a complaint had been received and requested a copy of the withheld information. A copy of the Trust Risk Register was supplied on 26 July 2010.
10. On 6 October 2010, the Commissioner wrote to the Trust requesting further details on its refusal of the request which was supplied on 4 November 2010.

Analysis

Exemptions

Section 36 - prejudice to the effective conduct of public affairs

11. Information may be withheld under section 36(2)(b)(ii) if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.
12. When determining whether section 36(2)(b)(ii) was correctly engaged by the Trust the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion.
13. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
 - Ascertain who is the qualified person or persons for the public authority in question;
 - Establish that an opinion was given;
 - Ascertain when the opinion was given; and
 - Consider whether the opinion given was reasonable.
14. In deciding whether the opinion was 'reasonable' the Commissioner has been led by the Tribunal's decision in the case *Guardian Newspapers & Brooke v Information Commissioner & BBC* [EA/2006/0011 & EA/2006/0013] in which the Tribunal considered the

sense in which the qualified person's opinion is required to be reasonable. The Tribunal concluded that 'in order to satisfy the sub-section, the opinion must be both reasonable in substance and reasonably arrived at' (paragraph 64). In relation to the issue of reasonable substance, the Tribunal indicated that 'the opinion must be objectively reasonable' (para 60).

The engagement of section 36

15. In this case the Commissioner has established that the reasonable opinion was given by Ms Catherine Bearshaw, who at the time of this request was Chief Executive of the Trust and therefore an employee of the public authority authorised for the purposes of the section by a Minister of the Crown in accordance with section 36(5)(o)(iii) of the Act.
16. In its submissions to support the application of section 36, the Trust has explained the process by which this opinion was provided, advising that Catherine Bearshaw was consulted in her capacity as qualified person "*throughout the process*" and that her opinion was arrived at after "*a number of meetings of the Executives of the Trust*". Unfortunately the Trust has not provided the Commissioner with the dates of the meetings, a copy of the qualified person's opinion, any notes taken at those meetings or the substance of any arguments that may have been taken into account at those meetings to help the qualified person form her opinion.
17. The Trust has however provided some documentary evidence to establish an opinion was given. An email dated 11 May 2010 indicated the opinion of the qualified person had been sought - in that the qualified person had reviewed and approved a proposed refusal notice which contained brief arguments as to why the requested information should not be released. In a further email dated 25 May 2010, the qualified person reviewed and approved a proposed internal review response which set out the rationale for the use of the section 36 exemption. The Trust also advised that the rationale for withholding the Risk register was debated again at a meeting of the Trust's Executive Team on 28 October 2010 (after the internal review) and the Trust remained of the view that the material was correctly withheld – it is not clear however if the qualified person attended that meeting.
18. The Trust advised the Commissioner that in coming to her decision, the qualified person was presented with the rationale for the use of the section 36 exemption which included the argument that staff within the Trust needed to be able to explore options and discuss and record risks and mitigation steps openly, without the fear of disclosure. The Trust

advised that the contents of the Risk Register are of a free and frank nature and that the risks remained live and ongoing.

19. The Trust also considered disclosure of a redacted copy of the Risk Register, however formed the view that releasing information that was incomplete would create the risk of that information being misconstrued or taken out of context. To support this argument the Trust referred to public interest arguments within Decision Notice FS50235016 issued by the Commissioner in the case of the Rotherham NHS Foundation Trust in which the Rotherham Trust had suggested *"trust and confidence could be undermined if information about risks is disclosed at an inappropriately early stage, causing premature alarm and distress if it relates to health provision"*.
20. The Commissioner considers if a reasonable in substance and reasonably arrived at opinion has been given by the qualified person, by the time of the completion of internal review, then section 36 will be engaged.
21. The Commissioner has therefore first considered whether the qualified person's opinion was reasonably arrived at taking into account the factors which were considered by the qualified person in relation to the application of section 36(2)(b)(ii). As stated above this primarily concerned the likely prejudicial effect of disclosure on the frankness and candour of internal discussions regarding the Trust's ability to effectively treat and mitigate risk. Despite not being provided with evidence that explicitly explains why the qualified person considered the information in question to be exempt (as opposed to why the Trust considered the information to be exempt), the Commissioner accepts that it was reasonable to conclude that disclosure of the risk register would reveal agreed risks and mitigation steps but notes that it would not reveal options that may have been explored and discussed during the drafting process. He does accept that the risks contained in the document remain live and ongoing. He is satisfied that the qualified person only took into account relevant factors when reaching her opinion. In view of this the Commissioner is satisfied that the qualified person's opinion was reasonably arrived at.
22. The next step for the Commissioner to consider is whether the qualified person's opinion was a reasonable one and then to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.
23. In deciding whether the opinion was 'reasonable' the Commissioner has been assisted by the Tribunal's decision in the case *Guardian Newspapers & Brooke v Information Commissioner & BBC* [EA/2006/0011 & EA/2006/0013] in which the Tribunal considered the

sense in which the qualified person's opinion is required to be reasonable. The Tribunal concluded that 'in order to satisfy the subsection, the opinion must be both reasonable in substance and reasonably arrived at' (paragraph 64). In relation to the issue of reasonable substance, the Tribunal indicated that 'the opinion must be objectively reasonable' (para 60).

24. The Commissioner, having considered the circumstances in which the opinion was given and the content of the information to which it relates, is satisfied that the opinion of the qualified person was an objectively reasonable opinion. Therefore the Commissioner concludes that the qualified person's opinion that disclosure of the withheld information would be likely to have the effect indicated is reasonable. He therefore finds that section 36(2)(b)(ii) was correctly engaged.
25. Before moving on to consider the public interest test, the Commissioner notes that the qualified person's opinion clearly identifies the likelihood of the inhibition in the case of section 36(2)(b)(ii) occurring as one that meets the lower test of 'would be likely to inhibit'.
26. As noted in the case of *McIntyre v Information Commissioner and the MOD (EA/2007/0068)*, the reasonable opinion of the qualified person is limited to the degree of likelihood that inhibition or prejudice may occur and 'does not necessarily imply any particular views as to the severity or extent of such inhibition or prejudice, or the frequency with which it may occur, save that it will not be so trivial, minor or occasional as to be insignificant'. The Commissioner understands this to mean that whilst due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the nature, severity, extent and frequency of prejudice or inhibition.

Public interest test

27. Section 36(2) is a qualified exemption and therefore the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

Public interest arguments in favour of disclosing the requested information

28. The Trust recognised there is public interest argument for providing greater transparency for decision making processes and in promoting openness within the Trust.

29. The Commissioner agrees with the Trust's public interest arguments in favour of disclosure relating to openness and transparency. He also considers that disclosure of the withheld information in this case would show the public how a key mechanism within the Trust makes decisions that impact on the healthcare system and how this process happens. Furthermore, disclosure of officials' advice and deliberations could provide a certain level of encouragement to ensure the quality of advice they provide in the future and actually improve decision making processes.

Public interest arguments in favour of maintaining the exemption

30. The Trust argued that in order to effectively treat and mitigate risk it is important that its staff are able to frankly record and discuss how best to manage such risks. The Trust considers release of the information in this case would be severely detrimental to the Trust's ability to explore options and discuss risks openly.
31. The Trust suggested that the public's trust and confidence in it could be undermined through disclosure of the 'live risks contained in the Risk Register (the Register) to the extent that the public could be deterred from seeking appropriate healthcare because of undue anxieties arising out of the content of the Register due to a lack of understanding of the wider context. The Trust referred to a public interest argument from a previous Decision Notice FS50235016, in the case of Rotherham NHS Foundation Trust in which it suggested that trust and confidence could be undermined if information about risks is disclosed at an inappropriately early stage, causing premature alarm and distress if it relates to health provision. The Commissioner has provided his general view on this particular argument in paragraph 37.
32. The Trust also advised that whilst it had applied the section 36 exemption to all the withheld information requested by the complainant it had also considered releasing a redacted version of the Register. The Trust however ruled this option out on the basis that the information in the Register would be incomplete and therefore greatly increase the risk of the information being misconstrued or taken out of context.

Balance of the public interest arguments

33. In considering the balance of the public interest, the Commissioner has again considered the nature of the withheld information and the factors he has cited above.
34. The Commissioner agrees with the Trust's public interest arguments in favour of disclosure relating to openness and transparency and that in order to effectively treat and mitigate risk it is important that staff

within the trust are able to discuss risk options openly. However he is not generally persuaded that disclosure of one set of discussions would necessarily inhibit future discussions, but is of the view that such arguments must be considered on a case by case basis.

35. Having reviewed the withheld information, the Commissioner has given due weight to the qualified person's opinion in considering the public interest test. However he has gone on to consider the severity, extent and frequency of the prejudice to the effective conduct of public affairs and has concluded that this would not be sufficient to sway the balance of the public interest in favour of maintaining the exemption and to outweigh the public interest in transparency.
36. The Commissioner considers that in relation to the any 'chilling effect' on the frankness of future advice provided by Trust staff that might result in poorer decision making, the guiding principle is the robustness of officials, i.e. they should not be easily deterred from doing their job properly.
37. The Commissioner would accept that depending on the issues being discussed, the early disclosure of certain information about risks could cause alarm and distress to some members of the public. However, as the Commissioner also pointed out in FS50235016 he is satisfied that it would be possible to mitigate such concerns by releasing other information to put such disclosures into context.
38. The Trust has also suggested that the public's confidence in the Trust could be undermined through the disclosure of the "*live risks*" contained in the Register to such an extent that people could be deterred from seeking appropriate healthcare and suggest disclosure could even cause premature alarm and distress. Whilst the Commissioner accepts such an outcome would not be in the public interest, he has not been provided with any evidence by the Trust to suggest why this would or could be the outcome of any disclosure of this particular information.
39. Whilst recognising that there is a risk of inhibition, the Commissioner is satisfied that the severity, extent and frequency of that inhibition would not be sufficient to tip the balance of the public interest in favour of maintaining the exemption. The Commissioner considers that the public interest in promoting transparency, openness and improving public understanding of and confidence in the management of risks within the Trust outweighs the public interest in maintaining the exemption.

Procedural Requirements

Section 1(1)(b): duty to provide information

40. Section 1(1)(b) of the Act requires a public authority to provide information to an applicant in response to a request. For the reasons set out above the Commissioner is of the view that all the requested information ought to have been disclosed to the complainant at the time of his request. As this information was wrongly withheld the Commissioner concludes that the public authority failed to comply with section 1(1)(b) of the Act.

Section 10(1): time for compliance

41. Section 10 of the Act states that a public authority must comply with section 1(1) promptly and in any event not later than twenty working days after the request has been received.
42. As the Commissioner finds that the public authority wrongly withheld the requested information from the complainant, it follows that the public authority failed to communicate this information to the complainant within the statutory time limit. Therefore the Commissioner finds that the public authority failed to comply with section 10(1) of the Act.

Section 17(7): refusal of request

43. Section 17(7) of the Act states a refusal notice issued under subsection (1), (3) or (5) must contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and contain particulars of the right conferred by section 50.
44. The refusal notice issued by the Trust on 11 May 2010 did not provide details of the Council's appeals procedure, nor did it state that it did not have such a procedure. It also failed to advise of the complainant's right, under section 50 of the Act, to apply to the Commissioner for a decision as to whether his request for information had been dealt with in accordance with the Act. The Commissioner therefore finds that the Council breached section 17(7) of the Act by not providing those details.

The Decision

45. The Commissioner's decision is that the Trust failed to deal with the following elements of the request in accordance with the Act:

- The exemption under section 36(2)(b)(ii) was engaged but the Commissioner decided that the public interest in maintaining the exemption did not outweigh the public interest in favour of disclosing the information.
- Section 1(1)(b) of the Act in that the Trust failed to provide information in response to a request.
- Section 10(1) of the Act in that the Trust failed to communicate requested information to the complainant within the statutory time limit.
- Section 17(7) of the Act in that the refusal notice issued by the trust did not provide details of the Trust's appeals procedure, nor did it state that it did not have such a procedure. It also failed to advise of the complainant's right, under section 50 of the Act,

Steps Required

46. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- To disclose the previously withheld Trust Risk Register as identified in this Notice.

47. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

48. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

49. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
50. For the purposes of the section 36 exemption, in order to establish whether a qualified person's opinion was reasonable the Commissioner will consider the information that the qualified person had in front of them when making a decision. This approach accords with the Information Tribunal's findings in *McIntyre v Information Commissioner* (EA/2007/0068), in which it stated at paragraph 47 that:
- "We would recommend to the Commissioner that in future investigations for complaints where a s.36(2) exemption has been claimed that he should require to see more evidence in relation to the opinion given by the qualified person, such as civil servants' submissions to ministers and their responses."*
51. During his investigation, the Commissioner asked the Trust to provide him with the information that the qualified person had access to when coming to a decision. While the Trust provided detail on some of the of arguments that were considered it did not provide any arguments that the qualified person may have considered. Whilst the section 36 exemption was considered to be engaged in this case, the Commissioner would have preferred to see a better documented process of obtaining the qualified person's opinion and would refer the Trust to the case of *University of Central Lancashire v the Information Commissioner* (EA/2009/0034) in which the Tribunal commented that it would normally expect a public authority to have documented the process undertaken when applying section 36.

Right of Appeal

52. 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

53. 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.
54. 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 5th day of April 2011

Signed

**Pamela Clements
Group Manager, Complaints Resolution
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 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Section 17(7) provides that –

"A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50."

Section 36(2)(b)(ii) provides that -

"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-

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.